CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT

THE TOWN OF MORGANTON.

AUGUST TERM, 1848.

THE STATE vs. JOHN COLLINS.

It is never the duty of a Judge to charge a jury upon a fact, purely hypothetical. If he does, it is an error, which can and will be corrected, if it act to the injury of the accused; and against which the Judge ought to be guard, as it is irremediable, if calculated to prejudice the prosecution.

Whether, on the trial of an indictment for homicide, the weapon, alleged to have been used, is a deadly weapon or not, is a question for the Court, not for the jury.

Where, on the back of a bill of a indictment, the clerk of the Court has certified, that certain witnesses were sworn and sent to the Grand Jury, that is sufficient evidence that the bill was sent to the Grand Jury.

Where the jury, on a trial for homicide, state that the *prisoner at the bar* is guilty, and the clerk, in recording the verdict, calls him the *prisoner at the bar*, this is sufficient evidence from the record to show, that the prisoner was actually in Court when the verdict was rendered.

The cases of *State* v. *Benton*, 2 Dev. & Bat. 196, *State* v. *Croton*, 6 Ire. 185, *State* v. *Swinke*, 2 Dev. & Bat. 9. *Reid* v. *Moore*, 3 Ire. 310, *State* v. *Christmas*, 4 Dev. & Bat. 413, cited and approved.

Appeal from the Superior Court of Law of McDowell County, at the Spring Term, 1848, his Honor, Judge BATTLE presiding.

The prisoner is indicted for murder. The case states, that the prisoner and the deceased, with many other persons, were assembled at the house of a Mrs. Gardiner, to shuck corn—while at dinner, a quarrel arose between the prisoner and one Morrison—in which the deceased, who was present, did not interfere. The prisoner left the table and the house, with the avowed intention of going home. He was, at that time, under much excitement, and observed to the company "boys do not follow me." After he had gotten within about fifty yards of the corn heap where he had left his coat, the witnesses on behalf of the prosecution stated, that the deceased, with several of the company overtook him, when a conversation ensued between the prisoner and the deceased, in which, at its close, the deceased observed to the prisoner, you can get over the fence and eat some shelotts, adding some rude expression, and immediately turned off from him and advanced towards the corn heap, when the prisoner advanced several steps towards the deceased and drew his knife, and while his back was to him gave the deceased the fatal stab of which he died within a week. After giving the mortal wound, the prisoner wiped his knife and put it into his pocket. For the defence, the prisoner's son, Zachariah Collins, swore, that upon the quarrel between his father and Morrison "the prisoner went out telling the boys not to follow him," that the deceased and others followed on behind him and the deceased came up to him and took hold of him by the shoulders and told him, that he might get over into the little patch and eat as many shelotts as he pleased (adding the offensive expression as stated by the witnesses for the State) that, at the time this took place, the prisoner and deceased were standing side by side, and that they stood so three or four minutes, that witness went on past them and did not see the stab given, and had gone eight or ten steps, when he heard the exclamation that the deceased was stabbed. Noah Connipe, another

witness for the prisoner, swore "that he saw the prisoner as he came out of the house, that he said he was mad, very mad, that witness carried him his hat, when he said he was going home as soon as he could get his coat, which he said was near the corn pile and he started off in a sort of trot, telling the young men among whom was the deceased, not to follow him. The witness also told them not to follow him, and his wife exclaimed, for God's sake boys dont follow him. The counsel for the prisoner contended, that the testimony of Connipe and Zachariah Collins was true, and that the jury must be satisfied from it, that the deceased was engaged, with the other young men, who were at the corn shucking, in laughing at and making sport of the prisoner, that the deceased had not only caught the prisoner by the shoulder, as stated by his son, but had used other violence to his person, by jerking him down and that the fatal stab was given, while laboring under the excited feelings thereby occasioned, and that therefore he was not guilty of murder, but only of manslaughter; and farther that the instrument used was not a deadly weapon and that the death caused by it was accidental, and for that reason also the prisoner could only be guilty of manslaughter. The instrument used was a pocket knife with two blades, one small and the other larger, and the latter was used and the blade was two inches and a half long, and ground sharp.

The presiding judge charged the jury, that, if the statement of Zachariah Collins were rejected as untrue, the homicide was undoubtedly a case of murder, that if Collins' testimony were believed, the mere catching the prisoner by the shoulder and using the language attributed to the deceased would not, of itself, amount to a legal provocation; they must be satisfied from the testimony of Collins, taken in connection with the other testimony in the cause, that the deceased had used more violence than that stated by the witness Collins, that the jury

must be satisfied, that the deceased had jerked the prisoner down as contended for by the prisoner's counsel, that that fact need not be distinctly proved, but might be distinctly and fairly inferred from other facts and circumstances proved, but it ought not to be merely guessed at or conjectured. The Judge further charged, that with regard to the knife, with which the stab was given, some weapons were deadly or otherwise, according to the persons by whom they were used; that a knife, which in the hands of a boy, two years of age, might not be deemed a deadly or dangerous weapon, might in the hands of a strong man be so; that if the jury believed that the knife used by the prisoner was not, in his hands, a deadly weapon, then the homicide was manslaughter, but if they thought, as used by the prisoner, it was calculated to inflict a mortal or a dangerous wound, the killing, in the absence of a legal provocation, was murder.

The prisoner was found guilty of murder and by his counsel moved for a new trial, on the ground that the court had misdirected the jury, both on the ground of the legal provocation and the nature of the weapon used. The motion was refused, and the prisoner appealed.

Attorney General, for the State.
Bynum, for the defendant.

Nash, J. The prisoner complains, that his Honor ought to have instructed the jury, that the provocation received by him was a legal one, and reduced the homicide, from murder to manslaughter. When the testimony, actually given to the jury, is separated from the suggestions of his counsel, of what might have taken place, the insufficiency of this defence is apparent. In his argument in the court below, the counsel for the prisoner insisted, that from the testimony of Connipe and Collins "the deceased had not only caught the prisoner by the

shoulder, as stated by his son, but had used other violence to his person by jerking him down." Of this additional violence, in jerking the prisoner down, no witness spoke. Collins himself, the son of the prisoner, saw nothing of it, nor did any other witness. It was, therefore, a mere assumption on the part of the counsel, forming no part of the evidence, and could not be taken into consideration, as, in any respect, qualifying the homicide. His Honor, in charging upon this portion of the defence, stated to the jury that they must be satisfied, from the testimony of Collins, taken in connection with other testimony in the case, that the deceased used more violence than that stated by the witness Collins, that the jury must be satisfied that the deceased had jerked the prisoner down, as contended for by the prisoner's counsel. In submiting to the jury an inquiry as to the existence of this alleged fact, his Honor went further, than in strictness he was bound to do, in favor of the prisoner. It is never the duty of a Judge to charge a jury upon a fact, purely hypothetical; if he does, it is an error, which can and will be corrected, if it act to the injury of the accused, and against which the Judge ought to guard, as it is irremediable if calculated to prejudice the prosecution. *Benton's case*, 2 Dev. & Bat. 169. It *was* a mere assumption of a fact, upon the part of the defence, entirely unsupported by any evidence whatever.

The catching the prisoner by the shoulder by the deceased was, under the testimony in the case, no assault. It is not stated by any witness, to have been done in a rude and angry manner. The language of Collins is, that when the deceased came up to the prisoner "he *took* him by the shoulder," not that he *caught* him. It does not appear that the witness considered it any violence, nor that the prisoner did, for according to the statement of the son, the parties "stood side by side for three or four minutes," during which time, and during the time, it took the witness to walk eight or ten steps, he does not testify

to hearing any angry words, or any scuffling whatever. The subsequent instruction upon this part of the case, that the fact of "jerking down" need not be distinctly proved, but might be taken "for true, from other facts and circumstances proved" was, as a general proposition, true, but had no application to the cause before the jury; there were no such "facts and circumstances" proved, as to authorise the jury to draw any such inference, or to justify the leaving the question to them.

We think his Honor, also, from tenderness to the prisoner, erred in his charge, as to the nature of the instrument used by the prisoner. It is submitted to the jury, as a question of fact, whether a knife, two inches and a half long, was a deadly weapon, and in describing to them what a deadly weapon is, he told them, if they thought the knife, used by the prisoner, was not, in his hands, a deadly weapon, then the homicide was manslaughter; but if they thought, as used by the prisoner, it was calculated to inflict a mortal or a *dangerous* wound, the killing in the absence of a legal provocation, was murder. We agree with his Honor as to the nature of a deadly weapon. The latter part of the definition is not such as is usual. It is generally described by writers, as a weapon likely to produce death or great bodily harm. There are no precise terms, however, appropriated in the law, to the description of such an instrument; it must be shown to be one capable of producing the effects described. No one can doubt, but that a dangerous wound is a great bodily injury or harm. The description, therefore, given in the charge was correct. The error of his Honor consisted in leaving that to the jury, as a question of fact, which is strictly one of law. This is decided in *Croton's case*, 6 Ire. 185. The Court in speaking upon the point now before us says: "If the instruction had been prayed in reference to doubt about the instrument being a deadly weapon, as we conceive, the Court ought not to have given it to the jury." Whether the instru-

ment used was such as is described by the witnesses, where it is not produced, or, if, produced, whether it was the one used, are questions of fact, but, these ascertained, its character is pronounced by the law; his Honor's error consisted in leaving the latter questions to the jury. But though in the charge, upon the points we have noticed, there was error, it was not such an one as was calculated to do the prisoner any injury. On the contrary, it gave him the full benefit of a defence, which did not arise in the case, in the one instance, and left to the jury in the other, as a matter to be found by them, a question, which the law had pronounced against him, in the other. In neither case, then, has he a right to complain, and of course no right to a *venire de novo*. *State* v. *Swinke*, 2 Dev. & Bat. 9. *Reid* v. *Moore*, 3 Ire. 310.

The prisoner has before us further moved to arrest the judgment and assigned the following reasons: First, because it does not appear from the record, that the bill of indictment had been sent from the Court to the grand jury, or how they got it into possession; Secondly, that it does not appear, that the prisoner was present in Court during the trial. As to the first objection, if it could be taken in this form, we should not think it sufficient. Upon the back of the bill of indictment is the following endorsement: "State *v.* John Collins, murderer. Calvin Gardin, James Ingles and others, witnesses, sworn, *sent* and bound. S. B. Erwin, C. S. C. L. A true bill. D. Glass, foreman." From this endorsement it appears, that the witnesses in behalf of the State were sworn in Court and sent to the grand jury, with their names endorsed as having been so sworn upon that bill. This sufficiently shows, that the bill was sent to the grand jury by the Court. The second objection is equally unavailing to the prisoner. It is very certain, that it is essential to the legal trial of a man upon a charge of life and death, that, he should be present, to avail himself of any objection that might occur

on the trial, and to confront the prosecutor and witnesses against him. *7th sec. of the Bill of rights.*

The question here, however, is not whether the prisoner was entitled to be so present, but whether it sufficiently appears on the record that he was present. The record does not set forth, with that fullness it might have done and such as is usual, what did occur on the trial. But "it is sufficient, if it be certain, to a certain intent, in general; it is not necessary that it should be certain, to a certain intent in every particular, so as absolutely to exclude every possible conclusion, all argument, presumption or inference against it." This is the language of the Court in *Christmas's case*, 4 Dev. & Bat. 413. The record in this case shows, in language sufficiently intelligible, that the prisoner was present at the conclusion of the trial. It states the names of the jurors who were sworn and charged to try the case; it then proceeds, who find: "*John Collins, the prisoner at the bar*, guilty," &c. It is answered on the part of the prisoner that this does not ascertain with sufficient certainty his presence during the trial.

Under the rule laid down in the case of Christmas we think it does; and that we are bound, from it, to believe that he was present during the trial. *Croton's case* is an authority on this point. The language of the Court in that case is: "But although it is the more correct that the presence of the accused should be expressly affirmed, yet we conceive, it is sufficient, if it appear by a necessary or reasonable implication, 6. *Ire.* 169. In this case the accused is called by the jury, in their verdict, the prisoner at the bar, and the clerk, in recording it, calls him the prisoner at the bar. It would be too violent a supposition, that he had been brought to the bar simply to hear the verdict pronounced, when his right to be present the whole time is secured to him by the fundamental law of the country; and when such is the uniform practice, if not a necessary, it is a reasonable implica

tion, that such was the fact and we so understand it. It has however been argued before us that the expression, the prisoner at the bar, is satisfied, by his being in the custody of the sheriff. The prisoner, it is true, is in the custody of the sheriff after his arrest, until duly discharged, unless he escape, but the term the prisoner "at the bar," is used to designate *where* he is in his custody, to wit, at the bar, in the presence of the court and jury.

We cannot disturb the verdict, nor arrest the judgement; therefore this must be certified to the Superior Court of McDowell county, that other proceedings may be had on the conviction according to due course of law.

PER CURIAM. Ordered to be certified accordingly.

STATE ON THE RELATION OF HENRY MARTIN vs. RICHARD W. LONG, AND OTHERS.

Where upon an action against a sheriff and his sureties, on his official bond, it appeared that the relator was a defendant in a writ, directed to the sheriff, and in his hands, and that the sheriff did not take a bail bond, but, in lieu of that, took a deposit in money, held that the sureties of the sheriff were not liable, although the said defendant offered to surrender himself and demanded the money of the sheriff.

The cases of *Fitts* v. *Hawkins*, 2 Hawks. 394. *Slade* v. *the Governor*, 3 Dev. 365. *Dudley* v. *Oliver*, 5 Ire. 227, *Ellis* v. *Long*, at this term cited and approved.

Appeal from the Superior Court of Law of Rowan County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

The action is debt on the bond given by the defendant Long, as sheriff of Rowan, and by the other defendants, as his sureties, suggesting breaches, pleas, conditions performed, and conditions not broken. At the trial the case was, that Long arrested the relator upon a *capias ad respondendum* at the suit of Vincent Reid, and took from him a bail bond with sufficient sureties, who were not freeholders. He told the relator at the time, that he would then accept that bail bond, provided the relator would, within six days thereafter, give other sufficient bail who were freeholders, or deposit with him gold bullion to the value of the sum demanded in the writ. At the expiration of the six days the relator failed to give a new bail bond, whereupon he was required by Long to make the deposit of gold with him as security to Long for not taking bail, and the relator accordingly placed in the hands of Long, 825 pennyweights and 16 grains of gold and took his written acknowledgement therefor, expressing that he had received it "as a deposit for said Martin as security on a writ of Vincent Reid against him and others." Afterwards, Long returned the writ and with it the bail bond originally taken by him. Before this action was brought, the relator offered to surrender himself to Long in discharge of the bail in the action of Reid, which was still pending, and also demanded a return of the gold or its value, which Long failed to make.

The council for the sureties moved the court to instruct the jury, that upon the case proved they were not liable in this action. But the court refused to give the instructions, and the jury found for the plaintiff and after judgment the defendant appealed.

Bynum, Clarke and Alexander, for the plaintiff.
Craige, Osborne and H. C. Jones, for the defendants.

Ruffin, C. J. The facts here make a flagrant case of oppression and fraud, and the recurrence of many such

would form a strong ground of appeal to the Legislature to alter the terms in which the sureties of a sheriff become bound for him, or to provide some other fit protection from such imposition on ignorant men in custody. But, however gross the wrong may be, or however otherwise the sheriff may be liable to answer for it, we believe the relator cannot have the redress he seeks on the sheriff's official bond. The question was remarkably well argued at the bar, and all the cases and reasons bearing upon it adduced. It was principally and ingeniously insisted on the part of the plaintiff, that the relation between the sheriff and his sureties, by reason of the privity of contract in the bond, was the same, or much the same with that between the sheriff and his deputy; and it was thence inferred, that the sureties are liable for the sheriff in every instance in which the sheriff would be liable for the same act or omission of his deputy. Cases were then cited, in which the sheriff was held answerable for almost every thing that a bailiff could do under a warrant to him, or while he held it: as for taking the property of A. under an execution against that of B.; for money received from the debtor on service of the writ to pay the debt; for false imprisonment by the bailiff in taking the body of a debtor, after selling his property on a *fi. fa.* and putting him in gaol; for cruelly misusing a prisoner and assaulting him, and others the like misfeazances. The propriety of the rule, on which the sheriff is held responsible for the acts of his under sheriff or bailiff, under color, or even pretence of a writ placed in his hands by the superior, which the possession of the writ enables him in some degree to accomplish, is not at all doubted by the court; though in some cases it seems to have been carried to an extreme beyond what one could have expected, as in holding the sheriff liable for the wanton and wilful trespass of the bailiff in arresting a debtor on a *fieri facias*. But the rule is founded on its necessity, and a principle of public policy, and may be

made as broad as those purposes require, when any proper occasion for its application shall arise. It is otherwise however, as between the sheriff and his sureties. The latter are liable upon a contract expressed in definite terms, and their liability cannot be carried beyond the fair meaning of those terms. Those required by the statute and contained in this bond are, that the sheriff will execute and due return make of all process to him directed; that he will pay and satisfy all fees and sums of money, by him received, or levied by virtue of any process, into the proper office, into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due: and in all other things will truly and faithfully execute the office of sheriff. It seems to us quite clear upon the terms *per se* and upon previous adjudications on them, that the present case does not come within any of them. There has been no failure to execute and return process here. The clause for the payment of money received or levied, is obviously restricted to money thus received or levied under, and by virtue of process commanding the sheriff to make the money, because it requires that he shall pay it into the office or to the person, to whom, by the tenor thereof, that is, of the writ, it ought to be paid, or may be due. Here he had no such writ or process, and the money was received wholly without authority of law, except the authority which was derived from the contract of the parties. The remaining provision only binds the officer affirmatively to the faithful execution of the duties of his office. It is thus seen that there is no clause to cover the case of an abuse or usurpation of power. There are no negative words, that, the sheriff will commit no wrong by color of his office, nor do any thing not authorised by law. In many cases, therefore, it has been held, that the sheriff's sureties were not liable for the sheriff, when he undoubtedly would be for his deputy. As familiar instances, the following may be

mentioned. For the defaults of the deputy in not returning, or making a false return, of a writ, the superior is answerable in fines, amercements, and penalties at common law. But it was not so with respect to the sureties, and it required the express enactment of the statute of 1829 to make them liable on the bond. So, if a sheriff collect taxes not duly laid, or for a year when the duty of collection belonged to another person, as former sheriff, the sureties cannot be made responsible. *Fitts* v. *Hawkins*, 2 Hawk's 394. *Slade* v. *The Governor*, 3 Dev. 365 *Dudly* v. *Oliver*, 5. *Ire.* 227; yet there can be no question that in either of those cases the sheriff would be bound to make good any sums collected by his deputy as taxes. So again, it was repeatedly decided before the act of 1818, that the sureties of a constable were liable to make good such money as he had authority to receive, and not liable for such as he had no lawful warrant to receive, nor the debtor bound to pay him, that is, when the constable had no execution. The same law still holds in respect to money received by a sheriff on a writ, in discharge of the debt sued for, as we have been obliged to hold at this term in the *State ex Rel. Ellis* v *Long, and others*, on the same bond now sued on. Yet one of the cases cited for the plaintiff decides, that the sheriff would be liable for such money, if received under like circumstances by his deputy.

With regard to the false imprisonment by a sheriff, or a battery by him on a prisoner, we know of no case deciding, that the sureties could not be reached, but we have never heard it supposed that they could, and we believe there is no such impression in the profession. Applying these principles to the present case, it seems to us the action cannot be sustained If it be looked at as a contract between a defendant in custody and the sheriff, that the latter shall become bail, as in our law he does, by not taking and returning sufficient bail, and the debtor will indemnify him, for thus becoming bail, by a deposit, the

sheriff's sureties cannot be bound for the return of the deposit, although they may be liable to the plaintiff in the action for his recovery against the sheriff as bail. As between the debtor and the sheriff, the contract is merely personal and in their natural capacities, as if the indemnity had been in the form of a mortgage of specific property; in which case we think clearly, that the sureties could not be held bound for a slave, for instance, if the sheriff should sell it. But no doubt, if the writ had been served by a deputy sheriff, who did not take bail, but received a deposit or mortgage by way of indemnity, that the sheriff would thereby become the bail and consequently be entitled to the benefit of the indemnity, and responsible for it. But we think the plaintiff has a right to consider this, not as a case of a voluntary contract between persons in *equali jure*, but as one imposed on him, which he was compelled to enter into by the power of the sheriff over him, while in custody, and afterwards felt himself obliged to comply with. He might justly treat it, therefore, if it would advance his case, as an undue and oppressive use of the sheriff's power, illegally to obtain his property from him. But in doing so, it does not appear to us, that he makes out a case for damages for which the sheriff's bond is a security; because no one of its provisions fairly cover it, judging either from its terms in themselves, or from prior constructions of them.

Per Curiam. Judgment reversed and *venire de novo*.

LAW LIBRARY OF University of MICHIGAN.

JOHN DAMERON vs. JOHN IRWIN, AND OTHERS.

Where a plaintiff declares upon a specific covenant under seal, to do a work in a certain time, he cannot recover for the price stipulated in that contract, unless he shows he has performed his work within the time contracted for.

Where it appears from the contract that it was made by public commissioners in behalf of the public, whether they were commissioners for the county, or for the State, such commissioners are not personally bound by their contract.

Appeal from the Superior Court of Law of Cleaveland County, at the Fall Term of 1847, his Honor Judge SETTLE presiding.

This is an action of debt upon a covenant. The plaintiff undertook and built a Court House in the town of Charlotte for the county of Mecklenburg, and brings this action, to recover the price agreed to be paid. The defendants were commissioners appointed by the County Court to make the contract, and the action is against them, upon the ground that by the deed executed by them, they are personally bound for the money. The covenant is as follows: "Charlotte, July 30th, 1842; know all men by these presents that we Stephen Fox, &c., *Commissioners for and on behalf of the County of Mecklenburg*, of the one part, and John Dameron of the other part, witnesseth, that whereas the said John Dameron hath agreed to build a Court House for the county of Mecklenburg, in the town of Charlotte, according to the specifications marked A, &c., the said Stephen Fox, &c., *for and in behalf of the county of Mecklenburg*, on their part do agree, that upon the execution of said contract fully, and according to the terms thereof, &c., by the first of January, 1844, *then, and in that case*, to pay to the said John Dameron," &c. It is further understood and agreed that

the *commissioners aforesaid* may make payment, &c. It is admitted that the building was not erected within the time specified for its completion, nor according to the specifications; but that the departures from it were made with the knowledge and consent, and by the directions of the defendants, and that the building was, after the summer of '44, used and occupied by the Court in the transaction of public business. It was further admitted that the lot upon which the building was to be erected was not purchased by the defendants until 27th April, 1843.

Upon intimation from the Court that the plaintiff could not maintain his action, he submitted to a nonsuit and appealed.

Avery, *Guion* and *Alexander*, for the plaintiff.
Osborne and *Wilson*, for the defendants.

NASH, J. The action is in debt, and the plaintiff claims the money to be paid for building the Court House. Two objections are urged against his right of recovery; one that the defendants are not personally liable, and the other that the plaintiff did not perform his contract by building the house within the time, and according to the terms specified. Both objections are fatal.

The plaintiff sues upon the sealed instrument, and in his declaration must set forth the terms of it, or its legal effect, and in general practice it is usual to set forth the words of the contract. 1*st Ch. on Pl.* 299, 302. In the contract in this case, the plaintiff was bound to finish the Court House by the 1st of January, 1844, at which time also, the money was to be paid, if the work was done. The defendants agree that upon the execution of said contract, fully and according to the terms thereof, the specifications, &c., by the first of January 1844 then and in that case to pay &c. It is admited that the Court House was not erected, according to the specification,

nor within the time prsecribed. There was then a fatal variance, between the allegation and the proof. The latter did not support the former. The plaintiff however says that the variations were all made by the directions of the defendant and that the house was not finished within the time, because the defendants did not furnish the ground until the 27th of April 1843, and that the Court House was received and used by the court. There is no doubt, that the plaintiff is entitled to receive the value of his work, and labor done, and materials found by him, but not in this action, which is brought on the covenant to pay. He cannot declare on one contract and recover on a different one. The defendants expressly agree that the money shall be paid upon the execution of the work, at the time specified, and according to the specifications. The covenant to pay the money is dependant upon the execution of the work according to the agreement. The plaintiff then cannot recover in this action without an averment of performance. *Clayton* v. *Blake*, 4th Ire. 497 *Glassbrook* v. *Woodrow*, 8th Term R. 366. The other objection is equally fatal to the plaintiff's recovery. The defendants in entering into this contract were acting as public agents, agents or commissioners of the county of Mecklenburg. They are therefore not personally bound, not because public agents cannot make themselves, by their contracts for their principals, personally responsible, but because in this instance, they have not. The doctrine on this subject was very elaborately and ably argued before the Supreme Court of the United States, in the case of *Hodgson* v. *Dexter*, 1 Cranch 345. The defendant was, at the time of making the contract, upon which the action was brought, Secretary of war, and, as such, leased from the plaintiff certain buildings in the City of Washington, for the use of the public, and covenanted, for him and his successors "to keep in good and sufficient repair," &c. This covenant was signed and sealed "Samuel Dexter," without any addition

whatever. The premises were burnt down during the lease, and the action was to recover damages, under the covenant to repair. Chief Justice Marshall, in delivering the opinion of the court says, "It is too clear to be controverted, that when a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government, are public and not personal," and the reasons given for the judgement in that case apply with entire propriety to this. The plaintiff's counsel, there as here, admitted the general doctrine, but denied its application to that case, alleging that the defendant had made himself personally liable. In answering that argument, the court admitted the terms of the instrument. In this case, as in that, it is admitted the building was for the use of the public and that the defendants had a right to make it, and in every part of the deed they show, for whose use, and under whose authority they were acting. In the binding part of the covenant the language is certainly explicit "and the said Stephen Fox &c acting for and in behalf of the county of Mecklenburg, &c." In a subsequent part they say, it is further understood and agreed that the *commissioners* &c. Whenever then in the course of the instrument, they are obliged to mention their own names, they state themselves to be commissioners, and acting for the county of Mecklenburg, and where they execute it, they execute it as commissioners. There is no allegation nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendants, to that of the county. It is farther alleged by the plaintiff's counsel, why the case of Dexter does not apply to this, that it was the case of a known agent of the government, and the defendants here were the agents, not of the government, but of the county. This objection is answered in the case *Hite and Goodman*, 1 Dev. and Bat. Eq. 364. In that case the defendant, with other magistrates of Gates county, had offered in behalf of the

county, a large reward for the apprehension of certain runaway slaves. The plaintiffs had captured some of the slaves and sued in Equity in consequence of the obstacle to a recovery at law, stated in the bill. His Honor Judge Gaston, in giving the opinion of the court, recognizes no distinction between an agent for the government, and any other public agents, but considering the defendants as public agents extends to them the protection of law, as such. He says "we consider it settled law that an action will not lie against a public agent for any contract entered into by him in his public character, unless he undertake, explicitly, to be personally responsible." Among the cases cited by him is that of Dexter. We consider this case decisive of the one before us. The defendants were the agents of the county of Mecklenburg in making the contract, so style themselves in the contract in every instance, in which they refer to their action, and so seal and deliver the covenant.

We see no error in the opinion of the presiding Judge. It is therefore affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM F. COWAN vs. SAMUEL TUCKER.

In an action for a slave, where a child claims on the ground that the slave was put in his possession by his parent, and that the parent afterwards died intestate without resuming the possession, evidence of the declarations of the parent made after the possession was transferred and not in the presence of the child, that he had lent and not given the slave, is inadmissible. Cases of *Moore* v. *Gwyn*, 4 Ire. 275, and *Stallings* v. *Stallings*, 1 Dev. Eq. 298, cited and approved.

Appeal from the Superior Court of Law of Iredell County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

The action is detinue for two slaves, and, on the general issue pleaded, the evidence at the trial was, that the defendant married a daughter of one Allison, the plaintiff's intestate, and that upon the marriage, Allison sent home with the defendant's wife the two negroes, and that they remained in the defendant's possession until the death of Allison, which happened about twenty years afterwards. Upon this evidence the defendant insisted, that the slaves were to be considered as having been given as an advancement from his father in law to him, and of that opinion was the court. To repel that inference, the plaintiff alleged, that the negroes were not given, but were expressly lent to the defendant, when they were put into his possession; and in support of that position the plaintiff offered to prove by a witness, that, some short time after the negroes went into the defendant's possession, Allison told the witnesses (neither the defendant, nor his wife being present,) that he had lent the negroes to the defendant and had not given them to him. But upon objection by the defendant the court rejected the evidence. The defendant obtained a verdict and judgment, and the plaintiff appealed.

Clarke, for the plaintiff.
Osborne and Guion, for the defendant.

RUFFIN, C. J. We think the act of 1806 does not alter the rule of evidence before applicable to such cases; and therefore, that the evidence here was properly rejected. In this very case it has heretofore been decided, that parol gifts are alone within the purview of the proviso to the act of 1806—5 Ired. 78. Therefore it was competent for the plaintiff to prove that the negroes were lent and not given. The question is, by what sort of evidence may the plaintiff establish the fact, that the defendant received them on those terms? Evidence to the fact of the loan at the time the negroes were delivered, or the declarations of the defendant at any time, or those of the parent, immediately, or a week or two proceeding the transfer of the possession, of the intention to lend the negroes, *Moore* v. *Gwyn*, 4 Ired. 275, are competent and relevant to that point. But it seems us, that it would be against principle and dangerous to admit the declarations of the parent made after he had parted with the possession, and in the absence of the child and never communicated to the child, as evidence of the fact of the loan, contrary to the rational and legal presumption of a gift. For, at common law, a gift of a slave was inferred, if the father put it into the possession of the child upon coming of age or marrying, unless upon distinct proof to the contrary. As a gift was presumed, the parent could not recover the slave in an action against the child. It follows, that he could not give himself or his executor an action by a declaration, not assented to by the child, that he never had given, but had only lent, the negro. But it is very ingeniously put by the counsel for the plaintiff, that under the act of 1806, the most positive parol gift is but a bailment at the will of the parent and may be terminated at his pleasure, during life, by recovering the possession, or at his death, by leaving a

will; and therefore that, after delivering the possession to the child, the parent has a continuing interest, on which his declaration may operate and ought to operate, since he could have no motive to make an untrue one. The distinction would be a sound one, if there were any thing in the statute, which allowed the parent to terminate his parol gift by declaration or by any thing short of changing the possession or disposing of the slave by a sale or conveyance to some one else, or by a bequest; for, before the act, the subsequent declaration of the parent was excluded, because the presumptive gift was a total alienation and conclusive upon him; and it is not so to every purpose since the act, but the parent may treat the gift as null in either of the ways mentioned, that is by an express bailment or by taking or disposing of the slave. His creditors may also, no doubt, treat the slaves as the parent's. But we do not think, it was the intention of the act, that the right of the child should be defeated in any other way. For, if there be an express gift to the child, or one implied from the delivery without any thing being said, then the act makes it a gift from the beginning, as it was before the act, provided only the possession continues with the child until the death of the parent, intestate. To use the language of Judge Henderson, the legislature not only withdrew the case within the proviso from the operation of the act, but validated and made it a good gift. *Stallings* v. *Stallings*, 1 Dev. Equity, 298. It is the same as if the act had never passed; and the gifts are made effectual from the time of the first delivery, and are to be accounted for as advancements at that time. Then, plainly, upon principle, evidence of subsequent oral declaration of the parent ought not to be admitted to divest the presumptive title of the child, at least, unless made to the child. For the means, whereby, according to the terms of the statute, the parent may terminate the inchoate gift to the child, are open and solemn

acts, done either to the child or in such manner as to put their existence and purpose beyond dispute and without much danger of fraud and perjury; namely, the demanding or resuming possession, or a disposition by sale or will. Hence Judge HENDERSON reasoned, that the circumstances stated in the proviso are, in the estimation of the legislature, evidence equal to that of the writing required in the first section to make a valid gift, and that the mischiefs intended to be prevented by the first section, that is, the setting up of spurious gifts by perjury and misconception would not arise in the case excepted by the proviso. That is true, for there can be scarcely a possibility for falsehood or mistake to go undetected, in setting up a parol gift under the circumstances mentioned in the proviso, as the possession is in its nature notorious, the presumption of a gift from it natural, and that presumption fortified, so as to become almost an absolute certainty, by the failure of the parent to make any other disposition during his life. But while fraud or misapprehensions are thus avoided in setting up gifts to children, a wide door will be opened to attempts to defeat even such as are within the words and meaning of the proviso, by setting up spurious loans upon the testimony of false or mistaken witnesses as to the secret declarations of the parent. The reception of such evidence would indirectly introduce many of the mischiefs the statute was intended to prevent. There is a plain difference between such private declarations, almost to be called mental reservations, and those made distinctly to the child, or the acknowledgements of the child. For the child, although he knows the parent may revoke his gift, or that the creditors may repeal it, expects on just grounds, that such will not be the case, and therefore he is willing to accept the slaves and be at the expense, perhaps, of rearing a family from them with the view to the ultimate completion of his title as from the beginning, either by the intestacy of the parent or by a donation in his will. But it might

be far otherwise, if the child were informed by the parent, that he had not given and did not intend to make a gift, but only a loan; for, then, he might be altogether unwilling to retain the slaves and rear others for other members of the family. It would be an act of plain imposition practised on the child by a parent, who would thus deal with him; but it would, probably, oftener be an act of injustice to the child and to the memory of the deceased parent, in his representatives' setting up, by false evidence of the dead man's declarations in secret, the pretence of a loan, where the parent had intended a gift, as proved by the enjoyment, which he allowed the child to have (as here) for twenty years under the expectation and belief, that he was to have the absolute property, and without any intimation to the child of the contrary in the parent's life time or at his death. Hence, the conclusion before stated seems to us to be the proper one; that, as, by the proviso of the act, the case of a parol gift is taken out of the enacting clause, when the possession of the slave accompanies the gift, and the parent dies intestate, so as to make the gift good in itself, and from the time of the possession acquired, as it was before the act passed, so no posterior declarations merely by the parent of a loan can be received now to defeat the operation of the proviso, by setting up a loan instead of a gift, more than they could before the act of 1806. Therefore the judgment must be affirmed.

Per Curiam. Judgment affirmed.

WILLIAM WHITESIDES *vs.* R. S. TWITTY, & AL.

It is incumbent on a party excepting, when the error alleged consists in rejecting evidence, to show distinctly in it, what the evidence was, in order that its relevancy may appear, and that it may be seen, that a prejudice has arisen to him from the rejection.

In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the Court can ascertain, whether or not the admission did, or might have done, the party a harm.

Appeal from the Superior Court of Law of Rutherford County, at the Fall Term, 1847, his Honor Judge SETTLE presiding.

The action is debt on a bond for $704 40, given by the defendants to the plaintiff, dated July 12th 1843 and payable twelve months after date, with the interest from date. Plea usury.

On the trial the defendants gave evidence, that one Anderson Staton, was indebted to the plaintiff upon several justice's judgements, on which executions were in the hands of one Morris, a constable in Rutherford county; and that it was agreed between Staton and the plaintiff, that Morris and a son of the plaintiff should go to South Carolina and bring thence into Rutherford a slave and a waggon and team, which Staton had there, and that when brought into this State Morris should seize them under the executions and hold them "to secure the said debts until the said Staton would give other security," and that, accordingly, the plaintiff employed Morris and his son for that purpose and paid Morris $10 for his services and also paid the expenses of the trip. The defendants gave further evidence, that afterwards it was agreed by and between Staton and the plaintiff and the present defendants, that, in consideration

that the said Staton would execute a bond to the defendants for the same amount and secure the same by a mortgage on certain property, they, the defendants, would give their bond to the plaintiff for the debt which Staton owed him upon the judgments and the plaintiff would accept the same and discharge Staton therefrom: all which was accordingly then done, that is to say, on the 12th day of July 1843; and the bond now sued on is that, which was so given by the defendants to the plaintiff, and was made for the sum due to the plaintiff for the principal money and lawful interest thereon mentioned in the judgments, and did not include the costs. The defendants further gave evidence, that on the 11th day of July 1843, Staton gave the plaintiff a note for $20, and the defendants offered the said Staton as a witness to prove that the same was corruptly accepted by the plaintiff as usurious interest for the forbearance of the day of payment. But he was objected to on the part of the plaintiff, on the ground that he was interested in the event of the suit, and was rejected by the court. The said Staton thereupon executed to the defendants a release of all rights and every equity then existing in or that might arise to him from the determination or result of this suit; but the court, nevertheless rejected him again. The plaintiff then offered in evidence the declaration of the said Staton, made both before and after the execution of the bond declared on "to show the consideration of the same note for 20." They were objected to by the defendants, but received by the court. The plaintiff had a verdict and judgment, and the defendants appealed.

Gaither, for the plaintiff.
Baxter, for the defendants.

Ruffin, C. J. If the opinions given on the trial were erroneous, yet as the case is stated in the bill of exceptions, it is not in the power of the court to assist the de-

fendants, and it is therefore unnecessary and improper to decide the question of evidence. From the nature of a bill of exceptions, as has been frequently declared by this court, it is incumbent on the party excepting, when the error alleged consists in rejecting evidence, to shew distinctly in it, what the evidence was, in order that its relevancy may appear, and that it may be seen, that a prejudice has arisen to him from the rejection. In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the court can ascertain whether or not the admission did, or might have done, the party a harm. For verdicts and judgments are presumed to be right and according to law and justice, until the contrary be shewn; and the bill of exceptions is required to state all the facts necessary to show the error clearly, since the party excepting is presumed to state the case as strongly against the other party and for himself, as he can, consistently with the truth. It would be unsafe for a court of error to proceed upon any other principle; for it is improper and, indeed, impossible in practice to set forth in every bill of exceptions the whole case made at the trial, or to do more than to raise the points made at the trial, on which the decisions are complained of. But it is indispensable to state the facts, on which those points arose, since, otherwise, it will not appear, that the decisions were practically injurious, and for such errors only can judgments be reversed, and not for any upon merely abstract questions, not legally affecting the rights in controversy. In the present case, one of the errors assigned is in rejecting a witness, who was to prove that a certain note for $20 was given by Staton to the plaintiff on the 11th of July, 1843, for usurious interest "for the forbearance of the day of payment;" but it is not stated what debt was forborne nor for what period, so as to connect it with the bond sued on in such a manner

as to render it void under the statute. It is left to inference merely, that the witness would have proved, that the plaintiff required or accepted that note as the consideration of his agreement to take the defendants for his debtors instead of the plaintiff, and to defer the payment a year in order to induce them to give their bond for the debt with interest. If that were the truth of the case, it would raise the question, whether the defendants, who are not alleged to have been parties to, or cognizant of, that part of the agreement, could avail themselves of the statute so as to avoid their bond subsequently given to the plaintiff for the sum really due to him, and for a sum truly owing from the defendants to Staton, the plaintiff's original debtor. Upon it, perhaps, it might be necessary to hold, affirmatively, in order to prevent evasions of this beneficial statute; but we do not propose to give an opinion on it at present, nor have we, indeed, considered it, as it is not necessary to the decision we have to make. For, clearly, in order to affect their bond with usury, the defendants must at least establish, that the agreement, on which the note for $20 was given as the illegal premium for forbearance, had reference to the bond they were to give. That they have not done; nor would have done, if the witness had been admitted and had sworn to what the exception says he was offered to prove, and it cannot be supposed he would have proved more. For it is not competent for this Court, without any direct allegation of the party to that purpose on the trial, to infer that, besides proving "that the note was given for the forbearance of the day of payment" of some debt, the witness would also have proved, that the forbearance purchased was prospectively of this debt, by giving twelve months time to the defendants on their bonds. Such an inference the Court could not, perhaps, draw in any case, but certainly, not in this. For here the note for $20, and the bond of the defendants were given, not only by different persons, but on different days; and, secondly, there

were two distinct agreements for forbearance, established upon the defendants' evidence: the one, on the judgments and executions, under which the property was to be seized and held in this State, until the debtor could give other security in a reasonable time; and the other, on the bond of the defendants afterwards given at twelve months. For which of those forbearances the note was given, it is impossible to tell, as there is nothing to distinguish; and therefore it must, or, at least, may be taken to have been the former. If so, then, according to many authorities, we think the plaintiff is entitled to recover. For it is settled, that to avoid a security as usurious, it must be shown to have been originally so; as if a bond be given for the sum lent and afterwards there be an agreement for illegal interest, the first bond continues good and may be recovered on, though the agreement for the excessive interest is void, or the lender may incur the penalty, if he receive the usurious interest. Then, in this case the plaintiff was legally entitled to enforce his judgments for every cent appearing to be due on them, as they were only for the principal, and lawful interest and costs actually owing to him; and consequently, a new security, taken only for the sums thus lawfully due on the judgments, could not be infected with usury any more than the judgments themselves, unless at all events, there was an agreement for an usurious premium for forbearance on the new security, and not merely a prior payment or security of such a premium for past forbearance on the prior valid security. As there was no usury in the judgments, there can be none in a bond given for them and nothing more. Therefore, the evidence rejected could not have maintained the issue on the part of the defendants, and its exclusion deprived them of no advantage, and furnishes no reason for ordering another trial.

For similar reasons the admission of Staton's declarations, however incompetent, furnished no ground of reversal, because it does not appear, what his declarations

were, and that they could have had any effect on the jury. It is stated, that they were declarations "to shew the consideration of the note for $20," but the exception does not set forth what was the consideration thus declared. It is impossible to conjecture even, what it was said to have been. It may be, that it was proved, that Staton declared it was given for the forbearance to the defendants. It was incumbent on the defendants to have set out the substance of the alleged declarations themselves, as, without knowing what they were, the Court cannot undertake to say, that they did or might mislead the jury.

Therefore, no error to the prejudice of the appellants being perceived in the judgment, it must be affirmed.

PER CURIAM. Judgment affirmed.

E. CANTRELL *vs.* C. C. PINKNEY.

Where a person resides in another State during the greater part of the year, but has a domicil n this State in which he also resides three or four months of the year, during which he keeps slaves here, he is liable during the time he resides in this State, to the requisition of the overseer of the road for the services of those hands, being of the description of hands bound by the general laws of this State to work on the road.

But persons, merely passing through the State, or visiting it for purposes of profit or pleasure, and remaining, for days, weeks, or even months without having any fixed home, are not persons, whom the overseer of the roads are authorized to summon, as being within their districts.

The case of *Kinzey* v. *King*, 6 Ired. 76, cited and approved.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term, 1848, his Honor, Judge BATTLE, presiding.

This was an action of debt, commenced by the plaintiff, as overseer of a public road in the county of Henderson, by a warrant before a single justice, to recover from the defendant the sum of twelve dollars for four days work of three hands. A judgment was given against the defendant by the justice, from which he appealed to the Superior Court, where, at the Spring Term 1848, the following case agreed was submitted to the presiding Judge.

The plaintiff was duly appointed an overseer of a public road in Henderson county, and the defendant owned three male slaves, over the age of sixteen and under the age of fifty years, who were assigned by the court of Pleas and Quarter Sessions of said county to work said road under the orders of the plaintiff. The defendant was duly notified to send said slaves to work on said road for four days each, which he failed or neglected to do; and, at the time when he was summoned to send said hands and for more than thirty days before, and at the time appointed to work on said road, the defendant, with said slaves, was temporarily living in Henderson county. The defendant alleged that he was a citizen of South Carolina, where he resides about eight months in each year, and where he has the principal part of his property, and claims and exercises the right of suffrage. But he has a place of residence in Henderson county, which he annually visits; and occupies about four months in each year, embracing the months of June, July, August and September. The slaves, who failed to work on said road, are servants, whom he brings with him on his annual visits to his residence in Henderson county, and takes back on his return to South Carolina. The defendant, both before and after he had been summoned to send his said slaves to work on the road as aforesaid, in passing a gate on the Buncombe turnpike road, refused to pay his toll, alleging that he was a citizen of Henderson county, and exempted

by the charter of the Buncombe turnpike company from paying toll. The parties agree that if the court be of opinion that the plaintiff is entitled to recover upon the foregoing facts, a judgment shall be entered against the defendant for twelve dollars, otherwise a judgment of nonsuit shall be entered. The presiding Judge was of opinion that the plaintiff was entitled torecover and gave judgment accordingly, whereuponthe defendant appealed.

Baxter, for the plaintiff.

N. W. Woodfin, for the defendant.

Battle J. The question, presented in the case agreed, is, whether the defendant, whose citizenship and principal residence is in the State of South Carolina, but who has a dwelling house in this State, where he resides with his family four months in each year, is liable to be called on to send his slaves to work the public roads of this State, during the time of his residence in it We are of opinion that he is, and we think so, because he comes within the letter of our "act concerning the public roads," 1 *Rev. St. Ch.* 104, and we can perceive nothing in its spirit to exempt him. The act provides, in the 8th section, that the several County Courts shall appoint overseers of the public roads in each county, and, in the 10th section, makes it the duty of the overseers, thus appointed, to summon all white males between the ages of eighteen and forty-five, and free males of color and slaves between the ages of sixteen and fifty years, within their respective districts, to meet at such times and places, and with such working tools as the overseers shall prescribe, for the working and repairing such roads as may be necessary. Each and every person so summoned is then required to attend, under pain of forfeiting one dollar for each day's neglect, provided he shall have been notified three days before the time

appointed for the meeting, and provided further, that, for the neglect of any slave, his master shall be liable to pay the penalty. The 12th section of the act then declares, that no such person, as is above specified, shall be exempted from working on the public roads, except such as is or shall be exempted by the General Assembly, or by the County Court, on account of personal infirmity, and except also such as shall send three slaves, or three sufficient hands. The provisions of the act are very broad, and will certainly embrace the slaves of the defendant, unless it can be shown that the Act was not intended to apply to them. This, the defendant's counsel has attempted to do, and his main, if not his sole argument is, that the defendant is not a citizen of this State, that he has only a temporary residence here, that the Act was intended to operate only upon our citizens, and that it requires express words to extend it to the citizens of other States. In support of this argument, it is urged, that the construction, insisted on for the plaintiff, would make the act include mere transient passengers and visiters, as well as persons having a temporary residence, like the defendant. We admit that our Legislature had in view principally our own citizens, because they compose a vast majority of the persons, upon whom the act could operate, and we admit further that persons merely passing through our State, or visiting it for purposes of profit or pleasure, and remaining for days, weeks and even months, without having any fixed *home*, here, are not persons whom the overseers of the public roads are authorized to summon, as being within their districts. Such persons are not fairly with in the words of the Act, and are certainly not within its meaning. Having no fixed place of abode within any particular district, and staying for no certain time, they could not have been contemplated as persons to receive the three days notice required in the act; and having no working tools, they could not reasonably be required to attend with them.

They are evidently then not the persons intended by the Legislature. But the case of the defendant is very different. For four months in each year, one third of his whole time, he has a fixed place of residence in this State. The time, during which he is to reside among us with his family and his slaves, is ascertained and well known. The overseer of the road, in whose district he lives, can have no difficulty in learning when and where to summon his slaves so as to secure their attendance; and they are presumed to have tools with which they can work. He is surely, then, within the very words of the Act, and why should he be exempted from its operation. The duty is only required to be performed during his residence in the State, and for that period, he is or may be in the constant use of our roads, and under the protection of our laws. We think, therefore, that he cannot be regarded as a mere transient passenger or temporary visiter. He certainly did not so regard himself, when he claimed an exemption from paying tolls to the Buncombe Turnpike Company, as being a citizen of Henderson County, which he could have justly claimed only by being such. But it is proper to say that we do not rely upon that fact, and we refer to it, only to show the light, in which such residents are generally regarded, the light in which they regard themselves, not as citizens for political purposes, but as citizens, while they reside among us, for many, if not, for all other purposes.

We have been unable to find any direct authority upon this question, but we think that the case of *Kinzey* v. *King*, 6 Ire. Rep. 76, has some analogy to it. It was there held, that a witness, who is summoned in this State, while casually here, but whose residence is in another State, cannot be amerced for non attendance, if he has returned home and is not in the State, when he is called out on his subpœna. But the Court say expressly, that if the witness be in the State when he is called, "he is subject to the

same rules as the citizens of the State; in such a case he receives the protection of our laws, and it will be his duty to obey the mandates of our process." Now the act declaring the manner, in which witnesses shall be summoned, and enforcing their attendance, &c., shows clearly in all its provisions, that it was intended to operate mainly upon our own citizens. 1 *Rev. St. Ch.* 31, sections from 64 to 75 inclusive. Yet we see that it has been construed to extend to the citizens of other States, during the time of even a temporary visit to this State. It is manifest, that the case before us is much stronger, so far as residence is concerned. We are therefore of opinion, upon a consideration of the whole case, that nothing has been shown on the part of the defendant to exonerate him from the penalty, incurred by failing to send his slaves to work on the public road, under the circumstances stated in the case agreed.

The judgment must therefore be affirmed.

PER CURIAM. Judgment affirmed.

MARTHA NEWELL *vs.* WILLIAM B. MARCH.

Where money has been paid, when it was not due, under a mistake of facts, it may be recovered; otherwise, if paid under a mistake of law.

The case of *Pool* v. *Allen*, 7 Ired. 120, cited and approved.

Appeal from the Superior Court of Law of Davie County, at the Fall Term, 1847, his Honor Judge PEARSON, presiding.

This was an action of assumpsit for money had and received—plea *non assumpsit*.

On the trial it appeared, that the plantiff had obtained a judgment in the County Court of Davie against one Samuel Newell for $2016 10-100, with interests and costs, and that an execution of *fieri facias* was issued thereon returnable to August Term 1842, which was placed in the defendant's hands, as sheriff, and was by him levied on a house and lot, belonging to the defendant in the execution, but he did not sell it on account of an order to that effect from the plaintiff. Several writs of *venditioni exponas* were then issued from time to time until November Term 1843, and were placed in the defendant's hands, but the execution of them was suspended by order of the plaintiff. From November Term 1843, another writ of *fi fa*. was taken out, and placed also in the defendant's hands but likewise suspended by the plaintiff's order, and no other execution was ever issued on the judgment. In December 1845, the defendant, who was still sheriff, called upon the plaintiff's agent for the costs including his commissions, and exhibited a statement in writing, in which commisions were charged upon the sum of $2449 08-100, that being the amount of the principal debt with the interest and costs thereon; the commissions amounting to $61 97-100. The agent paid the costs and commissions, and the action was brought, after a demand, to recover back the latter, either in whole or in part, upon the ground that the defendant was not entitled to receive them and they had been paid by mistake. It appeared further, on the part of the plaintiff, that both she and the defendant in the execution were non residents, and that he had no other property in the county of Davie than the house and lot levied on, and that they were not at any time worth more than $1000.

For the defendant testimony was introduced to show that he had several times advertised the house and lot for sale, but had been prevented frem selling by the or-

ders of the plaintiff's agent and that in October 1843, while the last execution was in his hands, Samuel Newell, executed to the plaintiff a deed in fee simple for the house and lot, in which the consideration was stated to be $2,500.

The plaintiff's counsel contended, that the defendant was not entitled to any commissions, or at most to commissions upon the sum of $1000 only, the value of the house and lot levied upon; and he insisted that the plaintiff could recover back in this action either the whole or a part of what had been paid to the defendant, as having been paid by mistake. His Honor held, and so instructed the jury, that the defendant was entitled to charge commissions upon the sum of $1000 only, as that was the value of the property which he had levied on, but that the plaintiff could not sustain the action against him for the excess, because the payment was made upon a mistake of law and not of fact, and was a voluntary one, and could not be recovered back in the action for money had and received; and that the defendant's being sheriff at the time of the payment, made no difference, as he had no process in his hands by which to coerce it. The defendant had a verdict and judgment and the plaintiff appealed.

Osborne, for the plaintiff.
Craige and Clarke, for the defendant.

BATTLE, J. It is the settled law of England, and has been so considered ever since the case of *Marriot* v. *Hampton*, 7 Term Rep. 265, that where money has been paid by the plaintiff to the defendant under the compulsion of a recovery at law, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The rule is necessary to prevent the repeated and protracted litigation of

the same matter; it being better that one person should occasionally suffer the wrong and inconvenience of paying an unjust claim, than that every person should be rendered insecure in the fruits of a recovery at law. *Interest reipublicæ ut sit finis litium.* Upon a principle somewhat similar, it was said by Mr. Justice PATTERSON, in the case of the *Duke de Cadoval* v. *Collins*, 4 Ald. & Ell. 858, (31 Eng. C. L. Rep. 206) that "where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." So it was held by Mr. Justice BAYLEY, in *Milner* v. *Duncan*, 6 Barn. & Cress. Rep. 671 (13 Eng. C. L. Rep. 294) that "if a party pay money under a mistake of the law, he cannot recover it back. But if he pay money under a mistake of the real facts, and no *laches* are imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." Many other cases involving these principles have come before the Courts of England, in some of which very nice distinctions are drawn, so as to make the decisions sometimes appear almost contradictory; but upon a review of the whole of them, Mr. Smith in his leading cases page 244, states these points to be clearly settled:

"1. That money obtained by compulsion of law, *bona fide*, and without taking an advantage of the situation of the party paying it, is not recoverable.

2. That money paid with full knowledge of the facts is not recoverable, if there be nothing unconscientious in the retainer of it.

3. That money paid in ignorance of the facts is recoverable, provided there have been no *laches* in the party paying it."

The American notes to the same work show, on the same page, that the principles above stated have been recognized in several of the States of the Union. In this

State there is no doubt that money paid under a judgment, or paid under legal process before judgment, where no advantage is taken of the situation of the party paying, cannot be recovered back. And it has been decided that it may be recovered if paid under a mistake of the facts. *Pool* v. *Allen*, 7 Ire. Rep. 120. No case has been brought to our attention, where our Courts have held, that if the money have been paid with a full knowledge of the facts but in ignorance of the law, it can be recovered back. We have certainly however adopted, as a principle of our law, that necessary maxim, that *ignorantia juris excusat neminem*, and we think it equally applicable to the payment of money under a mistake of the law, as to any other case. If so, it must govern the case before us. Here the plaintiff's agent, having full knowledge of all the facts, paid the money to an officer indeed, but to one who had, and could have had, no legal process against the plaintiff to compel the payment, and we think it not unconscientious that he should retain it. The judgment must therefore be affirmed.

PER CURIAM. Judgment affirmed.

AMELIA PARHAM vs. ELIZABETH BLACKWELDER.

A master is not responsible for a trespass committed by his slave, unless he ordered it to be committed or subsequently sanctioned it.

The case of *Campbell* v. *Staiert*, 2 Mur. 389, cited and approved.

Appeal from the Superior Court of Law of Cabarrus County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

This is an action of trespass, in which the defendant is charged with entering on the land of the plaintiff and cutting and carrying away a wagon load of wood. Plea, not guilty. At the trial, the evidence was, that a negro man, who belonged to the defendant, went with her wagon and team to the land of the plaintiff, and cut and hauled away a load of wood, worth fifty cents, and carried it to the defendant's yard. The counsel for the defendant insisted thereupon, that the plaintiff could not recover in this action, and moved the court so to instruct the jury. But the presiding Judge refused to do so, and instructed the jury, that, though, in such a case, the defendant would not be liable in trespass for the act of a free servant, yet she was liable in this action, because the trespass was the act of an irresponsible *slave*, doing work for the benefit of the owner. There was a verdict for the plaintiff, and, after judgment, the defendant appealed.

Osborne and *Barringer*, for the plaintiff.
Thompson and Coleman, for the defendant.

RUFFIN, C. J. The question in this case is of much consequence in this country, and, particularly, to the owners of slaves. Though formerly discussed to some ex-

tent, we had supposed it to have been long at rest in the minds of the profession, and that in a way, opposite to the opinion given to the jury on this trial.

The general principle is, that if one command or procure a trespass to be committed, he is answerable for it, as if done by his own hand. So, likewise is he, if a trespass be committed without his previous procurement, but for his benefit, and he afterwards assent to it, and take benefit by it. With those exceptions, we believe the law does not hold one person answerable for the wrongs of another person. It would be most dangerous and unreasonable, if it did, as it is impossible for society to subsist without some persons being in the service of others, and it would put employers entirely in the power of those, who have, often, no good will to them, to ruin them. It is admitted in the instructions, that such is the rule of law, when the trespass is committed by a servant who is free: which is, certainly true, and has been so deemed ever since the case of *McManus and Crickett*, 1 East. 106, though the servant, at the time of the wanton act of trespass, was engaged in the master's business. But it is supposed when the servant is a slave, the law should be different, upon the ground of the irresponsibility of such a servant for his trespasses. For the distinction, no authority has been discovered after diligent research by the counsel for the plaintiff, and we suppose there is none. That *per se* furnishes a strong argument against the action, as slavery prevails so extensively in this country, and there can be no doubt that many recoveries would have been sought and made, if the law were as assumed for the plaintiff. But we think the distinction is not supported more by sound principle than by precedent. The ground of it is, that a free servant is responsible for his trespasses, and a slave is not, and therefore that the master of the former is not to be held responsible, while the owner of the latter is. Now, there are two kinds of responsibility for tresspasses;

that is, *criminaliter and civiliter*. The latter alone is that referred to, as furnishing the reason for the distinction. The whole force of the argument consists in the necessity for responsibility, on some one, for lawless acts, in order to prevent their perpetration ; and the inference is thence drawn, that the responsibility must be thown on the master, as there is none on the slave. But it must be perceived upon further consideration, that the argument fails, since the slave, like the free servant, is subject *criminaliter*, when the act, which is injurious to another, amounts to a public offence, as is the case in respect to trespasses. Moreover, for the very reason, that slaves are not liable for damages, our law renders them summarily punishable corporally in many instances, in which free persons are not indictable. In restraint of wrongs by slaves, therefore, there is that most powerful consideration of responsibility personally, even to a greater degree than in the instance of free persons, in respect, at least, of minor offences, and in an equal degree in respect to all others ; and that is, surely, the most effectual protection both of the public and individuals from injury. But passing by that and looking to the responsibility of the party alone for the private injury, it seems very manifest, that the difference in that respect between an hired and an enslaved servant ought not to have the effect attributed to it. For, in general, the pecuniary responsibility of menials, though so by contract, is but nominal, and, in cases of aggravated injuries, it is altogether inadequate. The rule at common law could not have been founded on such a responsibility ; for it would most commonly be merely illusory. The true ground of the doctrine of the irresponsibility of the master, for the trespasses of his servant, is that before adverted to ; which is, that, for acts wanton or wilful of one person, another shall not be liable, though the former is the servant of the latter and engaged in his business at the time. For they are not acts done by the direction of the master,

or with his assent, or in the due course of the servant's employment. It was never argued on any other ground against the master in England, than the one, that the servant must or might be presumed to act by the master's orders, if at the time he was engaged in his master's employment. And that is the very point that was ruled in the negative in *McManus & Crickett*, when the servant was driving the defendant's carriage, either after he had set him down, or when he was going for him. This same reason applies as directly and cogently to the question of a master's liability for the trespass of his slave. It cannot turn upon the irresponsibility of the slave; for that would extend equally to his acts, when he was not, as when he was engaged in the master's business; in the former of which cases, the instructions to the jury imply, that the master would not be liable.

Indeed, the contrary could not be held, unless upon the ground as mentioned by Chief Justice TAYLOR in *Campbell* v. *Staiert*, 2 Mur. 389, that one is bound to keep up his slaves, as he is his beasts, to prevent their going on the premises of another: a doctrine as abhorrent to the feelings, as it is contrary to the usages of the country. If a negro leaves his master's plantation without a permit, he may be taken up and punished; but the owner is not compelled either to keep him always in his presence, or in close custody, in order to avoid being liable for his acts. This was distinctly held in the case just cited; and, although it is not so stated in the report, that case was like the present, according to my recollection, in nearly all its circumstances, and the decision was intended and considered to be upon the broad principle, that the master was not liable for the trespass of his slave, of which he was ignorant and to which he did not subsequently agree. Indeed, Judge DANIEL expressly puts the case on the point, that, although the slave was in his master's employment, the master was not liable, because the servant wilfully

committed the act, that is, without the direction of the master. That is the true criterion of the master's responsibility; whether he was, or was not, the cause of the trespass, by expressly ordering it, or subsequently sanctioning it; and, not, whether the person injured can or cannot have an action against the servant. If it turned on the latter ground, the owner would be liable although he were present forbidding the servant and doing all he could to prevent him from doing the wrong. In fine, it would bind the master to answer in damages for all the acts of a bad negro, upon the presumption of an authority to commit them; a presumption, which, as it seems to us, cannot be drawn from the relation of master and servant, in reference to one kind of servant, more than to another. It is the misfortune of one, who is injured in his person or property by another, that he cannot obtain adequate pecuniary satisfaction; but the misfortune is no greater, when the wrong doer is a slave, than when he is any one else, who has no property. That he is not able in either case to have such redress against the perpetrator of the wrong, affords no reason, why he should recover from one who is as innocent as himself.

Per Curiam. Judgment reversed and *venire de novo*.

KELSEY AND BRIGMAN *vs.* RESI JERVIS.

Where a petition is filed for a *certiorari*, upon the ground that a judgment has been improperly rendered by default in the Court below, the petition must set forth, not only an excuse for the *laches* in not pleading, but also a good defence, existing at the time when he ought, to have pleaded.

The case of *Betts* v. *Franklin*, 4. Dev. and Bat. Rep. 465 and *Dougan* v. *Arnold*, 4. Dev. Rep. 99 cited and approved.

Appeal from the Superior Court of Law of Yancey County, at the Spring Term, 1847, his Honor, Judge DICK, presiding.

This was a petition for a writ of *certiorari*, in which the petitioner set forth that he had been sued in the County Court in an action of debt, and that knowing it was not just, and thinking it was not legal, that he should pay it, he spoke to an attorney of the Court, who entered an appearance for him, but that afterwards, owing to some misunderstanding between his attorney and the other party, the attorney declined appearing on either side, in consequence of which a judgment by default was taken against the petitioner; that he had been misled by the course the cause had taken, and it had not on that account gone off on its merits. He therefore prayed for a writ of *certiorari* to bring up the transcript of the record of the case to the Superior Court. The writ was granted, and the case coming on to be heard upon the petition and affidavit, accompanying the same, in the Superior Court at the Spring Term 1847, it was ordered that the judgment by default should be set aside with leave to the petitioner to enter his pleas and have the cause placed on the trial docket; and from this order the plaintiff appealed to this Court.

Gaither and Francis, for the plaintiff.
J. W. Woodfin, for the defendant.

BATTLE, J. The only question presented on the record, which we deem it necessary to consider, is whether the petition for the writ of *certiorari* set forth sufficient matter to entitle the defendant to the benefit of that remedy. A writ of *certiorari* has been allowed in certain cases as a substitute for an appeal, but it is not, like an appeal, a matter of right of which a party may avail himself for the mere purpose of delay. It has also been allowed where a judgment has been taken in the County Court by default, and upon it the judgment has been set aside and the defendant allowed to plead, but that can never be done, unless the party shew two things, first, an excuse for the *laches* in not pleading, and secondly, a good defence existing at the time when he ought to have pleaded. *Betts* v. *Franklin*, 4. Dev. & Bat. Rep. 465. In the case before us, we need not enquire, whether the defendant has shown a sufficient excuse for his *laches*, in not pleading, because we are clearly of opinion that he has failed to show that he had a good defence at the time when he ought to have pleaded. The general allegation, that knowing it was not just, and thinking that it was not legal that he should pay the debt for which he was sued, he had employed an attorney to defend the suit, and that the cause "had not gone off on its merits," is certainly insufficient for that purpose. The defence, whatever it is, must be so set forth in the petition, that the Judge sitting at chambers, or the court, to whom the application for the writ is made, may see that it is *prima facie* a good one, for if it appear to be otherwise the application ought to be refused. *Dougan* v. *Arnold*, 4. Dev. Rep 99. The defendant in this case having failed to show in this petition what his defence was, the Judge ought not to have granted the writ of *certiorari*, in the first instance, but having done so the Court to which the

transcript of the record was returned, ought to have dismissed it, instead of making the order complained of.

That order must therefore be reversd and the same be certified to the Superior Court in order that the plaintiffs may have their proper remedy against the defendant and the sureties to his *certiorari* bond.

PER CURIAM. Ordered accordingly.

DEN ON DEMISE OF S. FLEMMING vs. BASIL DAYTON.

A judgment confessed by a third person, to satisfy a fine and costs imposed on one convicted of an offence, is regular and proper.

But an execution upon such a judgment can only issue against the person, who has confessed the judgment, and not against him, jointly with the person against whom the fine and costs were awarded, and an execution issuing against them jointly is void, and a sale under it conveys no title to the purchaser.

The cases of the *State* v. *Lane*, 1 Ire. 264, *State* v. *Johnson*, 1 Hay 293 *Dobson* v. *Murphy*, 1 Dev. & Bat. Rep. 566, *Blanchard* v. *Blanchard*, 3 Ire. 105, *Collais* v. *McLeod*, 8 Ire. Rep. 221, cited and approved.

Appeal from the Superior Court of Law of Yancey County, Spring Term, 1846, his Honor Judge PEARSON presiding.

This was an action of ejectment for a tract of land sold under two executions against the defendant and one Alfred Keith, and purchased by the plaintiff's lessor. On the trial it was admitted that the defendant was in possession of the land sued for, and the lessor rested his case, after shewing the judgments, executions and sheriff's deed to himself. The judgments appeared to have been con-

fessed by the defendant, Dayton, for the fine and costs of two indictments against Alfred Keith, in which he was convicted and sentenced to pay a fine of five dollars and the costs in each case, and for which he was ordered into custody until they should be paid. The executions were issued jointly against both Keith, and the present defendant Dayton.

The defendant's counsel contended, that the judgments confessed by him were irregular and void, because he was not brought into Court by any process, but if that were not so, the judgments were several, and the executions being joint against both Keith and Dayton, did not conform to them, and consequently the sheriff's sale under the executions was void and did not convey any title to the purchaser. The presiding Judge was of opinion, that the latter objection was good, and the lessor of the plaintiff thereupon submitted to a judgment of nonsuit, and appealed to this Court.

Avery and N. W. Woodfin, for the plaintiff.
Gaither, for the defendant.

Battle. J. The judgments confessed by the present defendant Dayton, although there was no process to bring him into Court, were regular and proper. *State* v. *Lane*, 1. Ired. Rep. 264. But they were not connected with those against Keith, so as to make them joint against both. They were indeed given and accepted by the State, as a payment of those against Keith, for which he was ordered into custody until the fine and costs, which were adjudged against him, should be paid. He could be discharged by the consent of the State, by payment of the judgments or by taking the oath for the relief of insolvents. *State* v. *Johnson*, 1 Hay. Rep. 293. The State, by its proper officer agreed to accept the judgments confessed by Dayton, as a payment or satisfaction of those against Keith, in order that he might be discharged from

custody. They were judgments against Dayton alone, and the executions issued upon them should have been against him only. Not having been so, the executions were irregular and void and the purchaser of the land sold under them acquired no title by his purchase. *Dobson* v. *Murphy*, 1 Dev. & Bat. Rep. 586. *Blanchard* v. *Blanchard*, 3 Ired. Rep. 105. *Collins* v. *McLeod*, decided at the late June Term of this court in Raleigh.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed

JOHN INGRAM *vs.* EZEKIAL DOWDLE.

A sale of land by a trustee, under a deed of trust, made for the purpose of satisfying debts secured by the deed, is governed by the "act to make void parol contracts for the sale of lands and slaves."

The case of *Tate* v. *Greenlee*, 4 Dev. 149 cited and approved.

Appeal from the Superior Court of Law of Macon County, at the Spring Term 1848, his Honor Judge BATTLE presiding.

This was an action of assumpsit for $210 being the price of a tract of land, which Alfred Hester conveyed to the plaintiff, upon trust to sell and out of the proceeds pay certain debts mentioned in the deed. The plaintiff read the deed of trust in evidence, and offered further to give ei dence by parol, that he set the land up at auction for ready money, as directed in the deed and that the defendant was the highest bidder at the sum of $210, and

that before bringing this suit he tendered to the defendant a deed for the land in the fee simple, which he refused to accept. But the court refused to receive the evidence, being of opinion that the contract was not binding on the defendant, because it was not in writing and the plaintiff was nonsuited and appealed.

No counsel in this court.

RUFFIN, C. J. The counsel for the plaintiff endeavored to take the case out of the "act to make void parol contracts for the sale of lands and slaves," by assimilating a sale by a trustee in a deed of trust for securing and paying debts to a sale under execution, in which latter case it was held in *Tate* v. *Greenlee*, 4 Dev. 149 that statute did not apply. But there is no analogy between the cases. The sale under an execution or a decree is that of the law, through its ministers, and upon that ground alone is founded the doctrine of the case cited. But in making his sale a trustee does not act under an authority from the law, but upon his own title, simply; and it is immaterial, to this purpose, whether his title be to his own use or that of others. It is said, indeed, that the trustee has no real interest in the subject, but is merely an agent for others; and, therefore, that there are none of those dangers of fraud or perjury against which the statute meant to provide. But if he could be looked on apart from his title, a trustee is not the agent of the law, but of private parties, and the statute wisely applies equally to contracts of sale effected by agents or by the owners themselves.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF J. C. JACKSON *vs.* ADAM HAMPTON & AL.

A deed of trust for land, which has no consideration except that the land should be sold for the payment of debts for which the bargainee was bound as surety, will not operate as a bargain and sale.

Appeal from the Superior Court of Law of Rutherford County, at the Spring Term, 1848, his Honor Judge BATTLE, presiding.

The action was brought against Alley, who was the tenant in possession, and the other defendant, Adam Hampion, was admitted to defend with him. The plaintiff claimed title to the premises as follows: The defendant Alley, being in possession, made a deed to John W. Hampton and Samuel S. Hampton, thus expressed: "Know all men by these presents, that I, John H. Alley, have bargained and sold unto John W. Hampton and Samuel S. Hampton, of &c. all my right and title to the land which I now live on, lying, &c., to them their heirs and assigns, to be held by them for the following purposes, to-wit, to raise from the said property the sum of $450, due from John H. Alley, to the Bank of the State of North Carolina, for which Jonathan Hampton, Senior, is surety, and also to secure them, the said John W. Hampton and Samuel S. Hampton, for their becoming sureties for me, the said John H. Alley for the sum of $500 to Robert G. Twitty; and so soon as it becomes necessary to carry this agreement into effect and to raise the money from the sale of the property for the purposes above mentioned, then the said J. H. and S. S. H. are to take the same into possession and expose the same to sale for

that before bringing this suit he tendered to the defendant a deed for the land in the fee simple, which he refused to accept. But the court refused to receive the evidence, being of opinion that the contract was not binding on the defendant, because it was not in writing and the plaintiff was nonsuited and appealed.

No counsel in this court.

RUFFIN, C. J. The counsel for the plaintiff endeavored to take the case out of the "act to make void parol contracts for the sale of lands and slaves," by assimilating a sale by a trustee in a deed of trust for securing and paying debts to a sale under execution, in which latter case it was held in *Tate* v. *Greenlee*, 4 Dev. 149 that statute did not apply. But there is no analogy between the cases. The sale under an execution or a decree is that of the law, through its ministers, and upon that ground alone is founded the doctrine of the case cited. But in making his sale a trustee does not act under an authority from the law, but upon his own title, simply; and it is immaterial, to this purpose, whether his title be to his own use or that of others. It is said, indeed, that the trustee has no real interest in the subject, but is merely an agent for others; and, therefore, that there are none of those dangers of fraud or perjury against which the statute meant to provide. But if he could be looked on apart from his title, a trustee is not the agent of the law, but of private parties, and the statute wisely applies equally to contracts of sale effected by agents or by the owners themselves.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF J. C. JACKSON *vs.* ADAM HAMPTON & AL.

A deed of trust for land, which has no consideration except that the land should be sold for the payment of debts for which the bargainee was bound as surety, will not operate as a bargain and sale.

Appeal from the Superior Court of Law of Rutherford County, at the Spring Term, 1848, his Honor Judge BATTLE, presiding.

The action was brought against Alley, who was the tenant in possession, and the other defendant, Adam Hampion, was admitted to defend with him. The plaintiff claimed title to the premises as follows: The defendant Alley, being in possession, made a deed to John W. Hampton and Samuel S. Hampton, thus expressed: "Know all men by these presents, that I, John H. Alley, have bargained and sold unto John W. Hampton and Samuel S. Hampton, of &c. all my right and title to the land which I now live on, lying, &c., to them their heirs and assigns, to be held by them for the following purposes, to-wit, to raise from the said property the sum of $450, due from John H. Alley, to the Bank of the State of North Carolina, for which Jonathan Hampton, Senior, is surety, and also to secure them, the said John W. Hampton and Samuel S. Hampton, for their becoming sureties for me, the said John H. Alley for the sum of $500 to Robert G. Twitty; and so soon as it becomes neeessary to carry this agreement into effect and to raise the money from the sale of the property for the purposes above mentioned, then the said J. H. and S. S. H. are to take the same into possession and expose the same to sale for

ready money, giving notice, &c., and out of the proceeds of sale pay," &c. Afterwards the trustees sold the premises to the lessor of the plaintiff for $500, and conveyed to him by deed purporting to convey the fee, with special warranty.

On the trial the counsel for the defendants raised several objections; among which, one was, that the deed from Alley passed nothing, because it was not founded upon any pecuniary consideration. The plaintiff then gave evidence that the deed was made in consideration that the other parties J. W. H. and S. S. H. would become Alley's sureties for the debt to Twitty and to secure them in so doing, and also to secure the payment of the debt to the Bank. Thereupon the Court instructed the jury, that the deed passed the land as against Alley; and the plaintiff had a verdict and judgment from which the defendant appealed.

Baxter, for the plaintiff.
Bynum, for the defendant.

Ruffin, C. J. Upon the opening of the case it struck us, that the deed might be supported by the debts mentioned in it, as a consideration; the securing and paying them being the real motive for making it. But looking further into the point, it is found not to be so. If there were a proper consideration to raise a use in the intended trustees and under the statute to vest the legal estate in them, then those debts would sustain the deed as against creditors and purchasers, as far as its validity depended upon the *bona fides* and adequacy of the consideration on which it was executed. The same would, no doubt, be true, as making those debts a sufficient consideration to support this deed as a contract and equitable assignment of Alley's interest in the land, whatever it might be. But as a valuable consideration they are not sufficient to support the deed as a bargain and sale to the trustees. The deed can only operate as a bargain and sale, if at all; since

there is no good consideration of blood to turn it into a covenant to stand seized, nor any to give it any other operation. But as a bargain and sale, it must have a valuable consideration; that is, money or money's worth. Though not expressed in the deed, such a consideration may be averred, and if established, it will make the deed good. *Mildmay's case*, 1 Rep. 25. Therefore the evidence was properly admitted here; but unfortunately it carried the consideration no further than the deed itself does, and the case is to be determined on the consideration therein expressed. Now it was held early after the statute of uses, that if one, in consideration that another is bound as surety for him, bargain and sell his land to the latter and his heirs, it will not operate as a bargain and sale. *Ward* v. *Lambert*, Cro. Eliz. 394. That case was, that one, reciting that A was bound in recognizances and other bonds for him, bargained and sold land to him and his heirs, and it was found, that there was no money paid. Whether that was a good bargain and sale was the question; and it was held not, because, in the words of WALMSLEY, Justice, "in every bargain and sale there must be a *quid pro quo*, but here the vendor hath nothing for his land and therefore it is void." Upon the authority of that case the doctrine is laid down as undoubted law by writers of the highest character. *Shep. Touch*, 222, (*Preston's Edition*) Com. Dig. *Bargain and Sale*, B. 11; and by no one has it since been questioned. Indeed it is obvious here that neither the bargainees nor any others were out of pocket one cent for this land, at least, for this bargain for it; nor did any one oblige himself to the bargainor, to pay to, or for him any sum as the price of it; a pepper corn would have answered; but as not even that was given or secured, no use could arise to the bargainees upon the contract, on which the statute could operate, and nothing passed to them in law. The price paid by the lessor of the plaintiff to the trustees was given for their estate in the land and not for Alley's interest; and

indeed, he received nothing from either the trustees or the purchaser, in the view of the law for his interest, and therefore it continues in him.

PER CURIAM. Judgment reversed and *venire de novo*.

SMITH & SHUFORD *vs.* E. CUNNINGHAM.

Where there is a joint judgment against two defendants in the Court below and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal. The cases of *Dunns* v. *Jones*, 4. Dev. & Bat. 154, and *Stiner* v. *Cawthorn*, 4. Dev. & Bat, 501 cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Spring Term 1848, his Honer Judge BATTLE, presiding.

This action is brought in assumpsit and commenced by warrant, before a single magistrate against the defendant and one Henderson.

Judgment was rendered by the magistrate against both the defendants, and Cunningham appealed to the County Court, from which the case was transferred under the Act of Assembly to the Superior Court. In the latter court the case was continued for several Terms, without any motion being made in it, on either side, though it appeared that the parties had summoned witnesses, at Spring Term 1848. The plaintiff moved to dismiss the appeal, because it was taken by one of the defendants only. This motion was resisted upon the ground that the plaintiffs had waived the objection by their delay and by summoning witnesses in preparation

for a trial. The court sustained the motion and ordered a writ, of *procedendo* to issue. From which judgment the defendant appealed to this Court.

Baxter, for the plaintiff.
N. W. Woodfin, and J. W. Woodfin, for the defendant.

NASH, J. That one defendant cannot appeal from a joint Judgment has been considered as the settled law of this State, since the case of Hicks and Gilliam, 4th Dev. 217. That case has been repeatedly noticed in subsequent cases and approved. That the principle operates in many cases harshly, has been felt and admitted, but the principle is considered as sound law. The objection made by the defendant cannot avail him. It was taken in the case of *Dunns & McIlvaine*, against *Jones*, 4th Dev. and Bat. 154 and overruled. In that case the action was brought in the County Court of Franklin, against one Ward and the defendant Jones. The defendants severed in their pleas, but the Judgment was joint. Jones appealed and Ward refused to join him. At the ensuing Term of the Superior Court, to which the appeal was returned, the plaintiff obtained an order for taking a deposition, and the cause was continued. At the next Term of the Superior Court the appeal was dismissed on the motion of the plaintiff, upon the objection that it was an appeal by one defendant from a joint judgment. His Honor's judgment was sustained by the Court. This case is recognized and approved, in the subsequent case of *Stiner* v. *Cawthorn*, 4 Dev. and Bat. 501.

PER CURIAM. Judgment affirmed.

RICHARD LEDBETTER & AL. *vs* L. O. GASH.

The law gives to tenants in common an absolute right to have their land divided.

A decree for partition should shew, on its face, the particular land to be divided, and the portion or share of the land, to which each of the tenants is entitled.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term. 1848, his Honor Judge BATTLE, presiding.

The petition is filed to procure a division of land. It sets forth that the petitioners are tenants in common in fee simple with the defendant, Gash, in three several tracts of land in the County of Henderson, on the waters of the French Broad River. The boundries of the tracts are set forth, in the exhibits filed with the petition, and the tracts are stated to contain thirteen hundred acres. The petitioners state that Alford, Augustus, Silas, Asais, Ephraim, and Scion Ledbetter, who are infants and sue by their guardian Charles Stagle, and John and Ann, and Joseph Ledbetter, and Ambrose Litton, and his wife Elizabeth, are entitled each to one fifteenth of said land, and Richard Ledbetter, and the defendant Gash are entitled to or own five fifteenths in equal moieties. They pray a partition of the land, so that each may hold his share or portion in severalty, as it will be to their interest, and pray for the appointment of commissioners for that purpose, according to law. The answer of Gash admits, that he is a tenant in common, with the petitioners, of the lands set forth, and in the proportions stated. It denies, that it will be to the interest of the parties, to have

partition made; but states that the land ought to be sold and the proceeds divided. To this purpose he is about to file a petition in Equity.

Baxter, for the plaintiff.
N. W. Woodfin, for the defendant.

BATTLE, J. The subpoena in this case was returned to the Spring Term 1848 of the Superior Court of Law for Henderson County, at which Term the defendant filed his answer, and the Court adjudged there should be a partition, as prayed for and an order was made at the same time appointing commissioners to divide and allot the land, and from this judgment the defendant appealed. The defendant in his answer, opposes the granting of the prayer of the petitions, upon the the ground that it will be more to the interest of all the parties to have the land sold and the money divided, becuase of the smallness of one of the tracts and the small proportion which the good land bears to the poor in another. With this objection we have nothing to do. The law gives to the tenants in common an absolute right to have their land divided, and the plaintiffs here were entitled to have their judgment for the appointment of commissioners, at the first Term to which the defendants was brought in, the tenancy in common being admitted in the answer. His Honor therefore committed no error in adjudging, that the petitioners were entitled to partition in the lands, and appointing commissioners for that purpose, but there was error in the form of drawing up the judgment. It should show, upon its face, the particular land to be divided and the portion or share of the lands, to which each of the petitioners and the defendant was entitled, and not leave those enquiries to the commissioners. In this case according to the petition and the answer, the six minor heirs and the petitioners, John, Ann and Joseph Ledbetter, and Ambrose Litton, and his wife Elizabeth are each entitled to one

fifteenth of the lands, and the petitioners Richard Ledbetter and the defendant Gash are entitled, each to one sixth part or interest in the whole. The only ground upon which the petition was opposed before us, was that the court erred in hearing the case, at the first term, at which the answer was put in. We have already answered the objection. The proceedings in partition are summary and made so with a view to save time and expense.

For these reasons the judgment must be reversed and the cause remanded, and this must be certified to the Court below.

PER CURIAM. Ordered accordingly.

DEN ON DEMISE OF HARVEN AND WIFE vs. HUNTER & SPRINGS.

Where a party, who was entitled to the possession of deeds, merely states on affidavit "that he did not know what had become of the originals, and that he had made due enquiry for them and was unable to obtain them," this is not sufficient to entitle him to introduce copies.

In order to authorize one, entitled to the custody of a deed under which he claims, to introduce a copy, it should appear that every place which the law deems its proper repository should be examined, and every person brought forward, who by law had been entitled to the possession of the deed.

The case of *Harper* v. *Hancock*, 6 Ire. 127, cited and approved.

Appeal from the Special Term of Mecklenburg Superior Court of Law, in November, 1846, his Honor Judge PEARSON presiding.

The plaintiffs claim title to the lands in dispute through Thomas Kendrick. They alleged that John Kendrick, the father of Thomas, devised to him and Green Kendrick, his brother, the land in dispute. To show title in John Kendrick the lessors of the plaintiff offered in evidence copies from the register's office of various deeds covering the land, and a similar copy of a deed from Green Kendrick to Thomas Kendrick of his moiety of the devised premises. Mrs. Harven, one of the lessors of the plaintiff, was the only child and heir at law of Thomas Kendrick, who died in the year 1829 intestate. At the time of his death, his daughter Mrs. Harvin was an infant and was but seventeen years of age, when she married the other lessor of the plaintiff. To entitle themselves to read the copies in evidence, the plaintiffs produced one Smith, who was the son-in-law and executor of John Kendrick, who proved, that, a few days before his death his testator delivered to him the original deeds, with the request that he would hand them to Thomas Kendrick, which he did, in whose possession they remained to the time of his death. Since then he knew nothing of them. The affidavit of W. Harvin one of the lessors of the plaintiff was then read. It stated "that he did not know what had become of the original deeds to John Kendrick or of that from Green Kendrick to Thomas, that he had made *due* enquiry for them and was unable to procure them. The admission of the copies was objected to by the defendants, but allowed by the court. Objections to other evidence in the case were made below, but were abandoned here, and the only question submitted to this Court, is as to the reception of the registered copies of the deeds.

Avery and *Osborne*, for the plaintiffs.
Wilson, for the defendants.

Nash, J. This cause was tried at the Special Term of he Superior Court of Mecklenburg County, held in the

Fall of 1846. The case, then, does not come under the operation of the Act of the General Assembly, passed at their Session begun in that year *Ch.* 68. *Sec.* 1, and the question is to be decided by the law, as it existed before the passage of that act. The admissibility of such secondary evidence, upon a proper case, is not denied, but it is denied that the plaintiff has entitled himself to it here. In the many cases, which have been from time to time, ruled in our Courts, the sound general rule, that the best evidence, which the nature of the case admits of, must be produced, has never been lost sight of, nor relaxed, beyond the manifest necessity of the case, and this necessity must be made clear to the court. The person, who claims the benefit of the exception, must swear, that the higher evidence is not in his power and that he does not know where it is, and its destruction or loss must be proved by the *person* in whose custody, it is presumed by the law to be. *Harper* v. *Handcock*, 6th Ire. 127. His Honor, who tried the cause, admitted the copies to be read, upon the presumption, that, in the absence of the proof to the contrary, the title deeds passed to Mrs. Harven, the heir at law, and the husband was competent to make an affidavit, to account for the non-production of the originals. Without deciding this question, the objection is as to the sufficiency of the affidavit itself, under the circumstances. The case does not profess to set forth the affidavit itself, but its contents. It states, not that he did not have the deeds in his possession but simply that the affiant did not know where they were and that he had made due enquiry for them, and was unable to procure them. It may be that his possession is substantially and sufficiently denied, but the affidavit ought to have set out what enquiries he had made, where and of whom, that the Court might judge, whether they were sufficient. It will be recollected also that the plaintiff Mrs. Harven was at the time of her fathers death very young and was but seventeen, when she intermarried

with William Harvin. If the County Court of Mecklenburg, performed their duty, she had a guardian appointed, in whose custody the title deeds of her real property would probably be, and if we are to take the affidavit as true, those deeds may be in his possession still, for it does not appear that he delivered them to the plaintiff, the husband. It is true, that, in order to show that an original is not in being, it is not necessary to prove that every place has been searched, where it might possibly be, or every person examined, who might, by any possibility have it in possession, but every place, which the law deems its proper depository, ought to be properly examined and every person brought forward who, by law, is entitled to the possession, 2 *Steph.* 1521. Nothing else ought to satisfy the Court, as the introduction of secondary evidence is from necessity, that the ends of justice may not be defeated. As from the case of *Harper* and *Handcock*, it must clearly appear, that the higher evidence was not within the party's power, to produce, we are constrained to say that the copies of the deeds were in this instance inadmissible.

Per Curiam. Judgment reversed and *venire de novo*.

WILLIAM V. BIRCH *vs.* HOWELL AND ARMFIELD.

Where the principal sum in a promissory note is under one hundred dollars, but the interest accrued makes the whole sum due on the note, upwards of an hundred dollars, the County Court has jurisdiction of a suit brought upon such note.

The cases of *Griffin* v. *Inge*, 3 Dev. 358, *McCarter* v. *Quinn*, 4 Ire. 43, and *Clark* v. *Cameron*, Ibid. 161, cited and approved.

Appeal from the Superior Court of Law of Davie County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

This was an action of debt commenced in the County Court of Davie, upon a prommissory note for ninety-three dollars and ninety-one cents, on which there was due for interest at the time when the writ was issued, the sum of eight dollars and twenty-one cents, making the total amount of principal and interest, due on the note at that time, one hundred and two dollars and twelve cents. Upon the return of the writ, a motion was made to dismiss the suit, because it was alleged to be commenced upon a promissory note for a less sum than one hundred dollars, contrary to the provisions of the 41 section of the 31st Chapter of the Revised Statutes. The motion was sustained and the suit dismissed, when the plaintiff appealed to the Superior Court, in which a similar motion was made and sustained, and from the orders of dismission the plaintiff appealed to this Court.

Craige, for the plaintiff.
Clarke, for the defendants.

BATTLE, J. We think that the Court below erred in dismissing the plaintiff's suit. The 40th section of the

31st chapter of the Revised Statutes enacts, that no suit shall be originally commenced in the County or Superior Court "for any sum of less value than one hundred dollars due by bond, promissory note or liquidated account signed by the party to be charged thereby," and the next succeeding section, to wit, the 41st, makes it the duty of the Court, if any suit shall commence therein "for any sum of less value than one hundred dollars due by bond, promissory note," &c. to dismiss it. In the Court below the *value* of a promissory note seemed to be considered the same as the principal sum due on it, without regard to the interest, and in that consisted the error. By the *value* of a note is meant what it is worth, and that must be both its principal and interest; otherwise all notes for the payment of the same amount of principal money, whether much, little or no interest is due upon them, will be of precisely the same value. This is certainly not so in fact, and it is not understood to be so in common parlance. This suit, then, having been commenced in the County Court upon a prommissory note of greater value than one hundred dollars, that Court had jurisdiction of it and ought not to have dismissed it, by reason of any thing contained in the 41st section of the Act referred to. But perhaps it may be contended the 6th Section of the 62nd Chapter of the Revised Statutes "concerning the power and jurisdiction of Justices of the Peace," has taken away the original jurisdiction of the Courts over cases of this kind. That section gives to a single justice, out of Court, the power to take cognizance of, and determine, any suit commenced by warrant upon a promissory note, the principal sum due on which is less than one hundred dollars, though that, together with the interest, may be more than one hundred dollars; but the section does not expressly, nor by any necessary implication, take away the jurisdiction of the courts, and consequently it remains and becomes concurrent. These pinciples are fully sustained by the cases of *Griffin* v. *Inge*, 3 Dev. Rep.

358, *McCarter* v. *Quinn*, 4 Ired. Rep. 43, and *Clark* v. *Cameron*, Ibid 161. The judgment of the Superior Court must be reversed, and the cause must be remanded for further proceeding therein according to law.

PER CURIAM. Ordered accordingly.

DEN ON DEMISE OF W. P. WAUGH *vs.* W. RICHARDSON.

A grant cannot be avoided upon evidence in ejectment.

The granting part of a deed is not avoided by a defect in the exception; but the exception itself becomes ineffectual thereby and the grant remains in force.

The cases of *Reynolds* v. *Flinn*, 1 Hay. 116, and *Lewis* v. *Porter*, 1 Hay. 126, cited and approved.

Appeal from the Superior Court of Law of Ashe County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

The plaintiff claimed the premises under a grant made to Jesse Ray, in 1829, for three thousand acres of land, as a bounty for erecting iron works, under the act of 1788. The patent describes the land by buts and bounds, which upon calculation, includes 8699 acres; and after that description, then follow these words, "including within its bounds, 5699 acres of land, which is excepted in this grant." The survey annexed to the grant, contains the boundries set out in the grant and designates the quantity of the land as 3000 acres, but does not except any part or quantity of the land within the survey. But the

plat attached to the survey has laid down, within the exterior boundaries of the whole tract, a number of smaller plats, having no description annexed to them, except that, within some of them, are written "100 acres, 175 acres," and so on.

The defendant alleged that the grant was void, and offered to prove by witnesses that the requisites of the statute had not been complied with in various particulars in entering the land and having it viewed and surveyed. But the court refused to receive the evidence. The defendant then offered witnesses to prove what land it was intended to except, and that such exception included 50 acres, which one Campbell had entered before Ray's survey, which was granted to the defendant in 1840. But the Court rejected this testimony also.

The defendant then moved the Court to instruct the jury, that it was incumbent on the plaintiff to shew with certainty the land excepted, and that without doing so, he could not recover. But the court refused to give such instructions, and informed the jury that the plaintiff was entitled to recover, as the defendant had not shown an elder grant for the land in his possession.

Verdict and jndgment for the plaintiff and the defendant appealed.

Clarke, for the plaintiff.

H. C. Jones, for the defendant.

RUFFIN, C. J. There have been a great many cases following those of *Reynolds* v. *Flinn*, 1. Hay. 106, and *Lewis* v. *Porker*, Ibid. 125, and firmly settling the principle there laid down, that a grant cannot be avoided upon evidence in ejectment, notwithstanding the strong and general terms in which the act of 1799 declares them void, if obtained contrary to law. The court was right, therefore, in rejecting the evidence of a violation of the provisions of the act of '88, since it could not legally impeach

the grant. For the same reason the grant could not be affected by excess of quantity above the 3000 acres, allowed as a bounty by the act. The case therefore depends upon the construction of the grant. Now that must be made upon its own terms and cannot be altered by evidence *aliunde* of an intention to except particular land, which is in truth not excepted in the deed. The evidence offered for that purpose was, consequently, also properly rejected. Then, what is the legal construction of the grant upon its face? There is no doubt that, but for the exception, it passes all the land covered by the boundaries according to the calls, courses, and distances, notwithstanding the quantity so far exceeds that mentioned in it; for the quantity is no part of the description and cannot control a definite description by metes and bounds, which is so well settled, as to have become an elementary rule of construction. It follows thence, that the question turns exclusively upon the operation of the exception; which is of "5699 acres, included within the bounds," without specifying any particular portion as constituting the quantity reserved, or any part of it. We think the exception, thus vague and uncertain, must be inoperative, and cannot restrain the general terms of the grant of the land according to the description in the patent. A grant of "5699 acres, included in a county, or included within certain boundaries covering 100,000 acres," would be void, for the uncertainty of the subject of the grant. So, when the grant clearly identifies the thing granted, it must pass all of it that is not properly and sufficiently excepted. The granting part of a deed is not avoided by a defect in the exception, but the exception itself becomes ineffectual thereby, and the grant remains in force. Such, we hold, to be the law of this case according to the terms of the patent. There is nothing in the plat and survey annexed to it, which can aid the construction, supposing they could have the effect in any case of extending, the sense of plain words in the body

of the grant; for, in fact, the grant goes beyond the description in the survey, in introducing an exception, at all; and the whole figure in the plat, formed by the lines called for in the survey, is occupied by smaller diagrams, in some of which there are numbers of acres set down, but there is no clew given therein to the enquiry, which diagrams represent the part or parts excepted. These circumstances, together with the disregard of the enactments regulating the proceedings on entries for iron works, alleged by the defendant, may furnish sufficient grounds for impeaching the grant in another proceeding.

But in this action the law is, that the grant is to be received as valid; and we think it is to be read, as if there were no exception in it, since the exception, as expressed is so vague as not to identify the part excepted and is therefore ineffectual.

PER CURIAM. Judgment affirmed.

R. J. ALLEN vs. MARVELL MILLS.

Under the Acts of Assembly, establishing the County of Polk, connected with the Act of 1836, Rev. St. ch. 31, sec. 39, a citizen of the County of Polk has no right to institute a suit in the Superior Court of Rutherford County against another citizen of Polk, and on plea the suit must be dismissed.

Appeal from the Superior Court of Law of Rutherford County, at the Spring Term, 1848, his Honor Judge BATTLE presiding.

The writ is in case and was issued, from the office of the Superior Court of Rutherford County, to the Sheriff of Polk County, by whom it was served on the Defendant. Upon its return the Defendant filed a plea in abatement, alleging that neither the plaintiff nor the defendant were residents of the County of Rutherford, but before and at the time of issuing said writ "he the said plaintiff and this defendant, were and from thence hitherto have been and still are residents of the County of Polk. To this plea there was a general demurrer. On argument, the Court adjudged, "that the demurrer be overruled and the defendant go without day." The plaintiff appealed to this Court.

N. W. Woodfin, for the plaintiff.
Baxter, for the defendant.

Nash, J. The controversy arises under the Act of the General Assembly, passed in the year 1846-7, for establishing the County of Polk. By the Act of 1836, *Rev. St. Ch.* 31, *Sec.* 39, it is provided among other things, "that all actions on the case, shall be brought to the Court of the County, where both parties reside; and where the parties live in different Counties, shall be brought to the Court of either County, at the option of the plantiff, and when any suit or action shall be brought, otherwise than is herein directed, such action or suit, may be abated on the plea of the defendant." The demurrer admits that both the parties, at the time the writ was issued, lived in the County of Polk, and the judgment of the Court was clearly right, unless the Act of 1846 has otherwise directed. In other words, the Superior Court of Rutherford has no jurisdiction of the case, unless that Act gives it. It is not pretended that any other does. Let us examine this Act then and see what is the jurisdiction conferred by it on the Superior Court of Rutherford, as to the question before us. By the 26th ch. 1846, the County of Polk is established and its boundaries prescribed, and by the

supplemental Act, ch. 29, its rights, privileges and immunities are secured to it. By the first section, it is invested with all the rights, privileges and immunities of other Counties in the State. By the 4th sec. a Court of Pleas and Quarter Sessions is established, the times and place of holding its Terms designated, and by the fifth its jurisdiction is pointed out. It declares, that the County Courts "shall possess and exercise the same power, authority and jurisdiction, as is possessed and exercised by the County Courts in this State, and shall have exclusive jurisdiction of all crimes committed within the limits of said County, until a Superior Court shall be established for said County and all suits at law now pending in the County Courts of Henderson and Rutherford, wherein the citizens of Polk County are both plaintiffs and defendants; and all indictments in the County Courts of Rutherford and Henderson, against citizens of Polk County shall be transferred to the County Court of Polk, and all appeals from the County Court of Polk shall be sent to the Superior Court of Rutherford, where the plaintiff resides in that portion of Polk County, taken from Rutherford, and to the Superior Court of Henderson where the plaintiff resides in that portion of the County taken from Henderson." So far then, as the police of the County, and the inforcement and protection of the civil rights of the citizen, and the punishment of crimes of an inferior character and most frequent occurrence, are concerned, the organization of the County was complete. By the act of '36 *Ch.* 31, *Sec.* 5 and 40, the Courts of Pleas and Quarter Sessions "have full power and authority to determine all causes, of a civil nature whatever at the common law, within the County, where the original jurisdiction is not by any act of the General Assembly confined to a single magistrate or to the Supreme or Superior Courts." The original jurisdiction of the County and Superior Courts, in civil matters, is concurrent without any regard to the amount claimed, where it is not confined to a single magistrate, and an

action can be brought in the County Court to recover any amount of money, for which it can be brought in the Superior Court. This jurisdiction is conferred, by the above section of the Act of '46, on the County of Polk, with the right of appeal, as pointed out in it.

The action, in this case, could have been brought in the County Court, and although no Superior Court was then organized, the suitors in it were not deprived of the right of having their cases revised. Provision is expressly made, securing the right of appeal, and at no greater costs as to the circumstances, than existed before the erection of Polk County. It is evident, it was not the intention of the Legislature to give to the Superior Court of Rutherford any, but an appellant, jurisdiction in cases of a civil character, arising in Polk County, where the plaintiff resided in the latter. In other words, they did not intend to alter the general law governing the bringing of actions, as regulated by the Act of '36. The 6th sec. of the Act of '46 is however conclusive upon the question. No Superior Court had been organized for the County of Polk, and provision was to be made for the punishment of those higher offences, the jurisdiction over which, by the general law of '36, is confined to those tribunals. The 6th sec. accordingly provides, "that all criminal offences, which may be committed in the County of Polk, which are cognizable only in the Superior Court of Law, shall be and continue, under the jurisdiction of the Superior Courts of Law of Rutherford, where the offender resides in that portion of Polk County, which was taken off from Rutherford County, until a Superior Court shall be established for the County of Polk." It is thus seen that the Legislature, in this matter, did not act unadvisedly, or without a due attention to the convenience and interest of the citizens of Polk County. In every case, where the law would be enforced within the County, provision is made for its due execution, at the same time securing to suitors, the same right of having their cases

examined before a Superior Court, as was enjoyed by those of all other Counties. And in those cases, when by the general law, they could not be so examined into, provision is made for a resort in the first instance to a tribunal without the County, and in giving *this* original jurisdiction to the Superior Court of Rutherford, they restrict it to criminal offences and to those, which, alone, are cognizable in the Superior Courts, and, thereby, denying it, impliedly, in civil cases.

PER CURIAM. Judgment affirmed.

THOMAS R. MILLER *vs.* J. J. BATES.

A justice of the peace, before whom an attachment is returnable, has no right to refer the papers to the County Court, unless it appears that the plaintiff made oath before him that the garnishees owed to the defendant some debt, or had property of his in their possession, or that they made such a statement of facts, that the justice could not proceed to give judgment thereon. The process returned to the County Court, without some of these matters being certified by the Justice, should be dismissed.

Appeal from the Superior Court of Law of Henderson County, at the June Term, 1846, his Honor Judge BATTLE, presiding.

The plaintiff sued out an attachment against the defendant returnable before a single justice, and caused several persons among whom was George Clayton, to be summoned as garnishees. They accordingly appeared before the justice, who after examining them upon oath, made the following endorsement upon the attachment.

"On examination of the within attachment before me, Lincoln Fulton, an acting justice of the peace for the County of Henderson, the plaintiff and garnishees being present and having been examined on the garnishment on their oath duly administered, and declaring thereon that the plaintiff in this attachment can have no claims whatever upon any amount in their hands due James J. Bates, and I from examination rendered judgment against the plaintiff for costs, took his affidavit according to law, and transmit the same together with the original attachment, and all the papers thereto annexed, to the Court of Pleas and Quarter Sessions for Henderson County, that due justice therein may be rendered according to law. I have directed the officer to notify the parties that the same will be returned to the next County Court." There was also an endorsement by the justice of his judgment against the plaintiff for costs, though he "found the debt of the plaintiff to be just for the sum of about fifty dollars." And another endorsement of a levy of the sheriff in these words, "levied this attachment on James J. Bates's interest in one lot in Hendersonville and improvements, the lot on which George Clayton now lives, at the suit of Thomas R. Miller."

The attachment with the proceedings thereon and other papers were returned to the next County Court, from which they were transferred by virtue of the act of 1844, *Ch.* 12 to the Superior Court, and, at the Special Term thereof in June 1846, they were dismissed, upon the motion of the counsel for the garnishees, and the plaintiff appealed.

Francis, for the plaintiff.
Baxter, for the defendant.

Battle J. We cannot see how the Court below could have done otherwise than dismiss the attachment, as having been improperly returned by the Justice of the

County Court. The "act authorizing attachments to issue for the recovery of debts, and directing the proceedings thereon," 1 Rev. Stat. Ch. 6 prescribes, in the 14th Section, the mode of proceeding against garnishees in attachments returnable before a single justice. Among other provisions, it declares that "when any garnishee shall on his or her garnishment, deny that he or she has in his or her possession any property of the defendant, and the plaintiff in such attachment shall on affidavit suggest to the justice, that such garnishee owes to, or has property in his or her hands belonging to the defendant, or when any garnishee shall on his or her garnishment make such a statment of facts that the justice, before whom such garnishment shall be made, cannot proceed to give judgment thereon, then, in either of these cases, the justice shall return the attachment and other papers to the next County Court to be held for his County and the Court shall order an issue or issues to be made up and tried by a jury and the Court shall give judgment on the verdict of the jury as in other cases." Now, in the case before us, it does not appear, that the plaintiff suggested on oath either of the things which authorized the justice to return the proceedings to the County Court. The justice says merely, that he "took the plaintiff's affidavit according to law," but he does not state that the plaintiff swore, that the garnishees owed to the defendant any debt, or had any property of his in their hands or that they made such a statement of facts that the justice could not proceed to give judgment thereon. He therefore, apparently, had no authority to return the attachment and accompanying papers to the County Court, and the garnishees had the right to have the proceedings dismissed as to them; particularly as it does not appear that the plaintiff, after the attachment and papers were returned to Court, ever moved to have an issue made up to try the question of their indebtedness to the defendant or of their having any property belonging to him in their

hands. Nor could the attachment be sustained before the Court by virtue of the levy on the land of the defendant in the possession of George Clayton. It does not appear that the lot was shown, or offered to be shown, by the plaintiff, to belong to the defendant; but if that had been done, the justice did not condemn the same for the satisfaction of the plaintiff's debt, as he was required by the 20th Section of the before recited act, to have done, before he returned the attachment to the County Court. Therefore, neither the County Court, or the Superior Court, to which the cause was transferred, had jurisdiction of it, and the latter Court did right in dismissing it. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

D. F. RAMSOUR & WIFE vs. JOSHUA HARSHAW.

On an appeal from the judgment of a Justice of the Peace, if the defendant does not plead, so that an issue may be made up, the Court may render judgment either with or without the verdict of a jury.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term 1848, his Honor Judge BATTLE, presiding.

The suit began by warrant before a Justice of the Peace for $25 85, due by account. From the transcript the case appears to be as follows: The suit was commenced on the 5th of March, 1845; and the defendant appeared before the Justice and "pleaded the statute of

limitations," thereupon judgment was rendered for him and the plaintiff appealed to the County Court. At December Term, 1845, the plaintiff was non-suited and appealed to the Superior Court; and in March 1847, the case was submitted to a jury and the plaintiff was again non-suited; but on his motion the non-suit was set aside on the payment of costs. At March Term 1848, a jury was again impannelled to try the issue on the statute of limitations, and while the trial was pending, the defendant offered to plead a set off, but the Court refused to receive the plea and there was a verdict for the plaintiff. The defendant's counsel then moved in arrest of judgment, because there was no issue joined on which a verdict could be given, but the Court gave judgment and the defendant appealed.

J. W. Woodfin and *Francis*, for the plaintiff.
Edney, for the defendant.

RUFFIN, C. J. The motion to plead a set off was properly refused, whether it be regarded as a motion to plead *ab origine*, or to add a plea to one before made. Being a motion addressed to the discretion of the Superior Court, the decision there is final. It has been often held so in respect to adding a plea. So it must be, when the defendant does not plead in apt time and wishes to do so afterwards. The Act of 1794 allows a trial by jury on an appeal from a justice on an issue made up in the County Court, but it directs that the issue shall be made up at the first term, and consequently the defendant, as a matter of right, cannot plead after that term. Upon this ground, this Court could not reverse the decision, being on a matter of discretion, whatever we might think of its propriety. But under the circumstances and in that stage of the case the Court very properly, in our opinion, refused to admit the plea tendered.

We think likewise that the Court properly refused to arrest the judgment. The defendant insisted on the statute of limitations before the magistrate, and he entered it on the warrant as "the plea" of the defendant, and although no plea was formally drawn up and filed in the County Court, it is obvious that both parties treated that minute as a plea, on which issue was joined in both the County and Superior Court. The plaintiff was twice non-suited, because he was not ready to prove his case on that issue, there being no other, and he was compelled to pay the costs to the defendant in order to get his cause reinstated. The justice of the case therefore clearly required judgment to be given on the verdict, as upon an issue joined. But if it be admitted that there was no plea in Court, the plaintiff would still be entitled to judgment, for the want of a plea. From the nature of the jurisdiction of a Justice of the Peace, an appeal from him was to all the Justices, sitting in the County Court for a re-hearing in a summary way, like that before had out of Court. Such is the course on appeals to the Quarter Sessions in England. Accordingly, our Acts of 1777, *Rev. Co. C.* 115, 63, expressly provided for a re-hearing or determination by the Justices of the Court without further process, and in a summary way without a jury. The Act of 1794, *Rev. Code C.* 414 directs, indeed, that an issue shall be made up and tried the first Court by a jury. But it is obvious there can be no issue made up, unless the defendant will tender one by plea; as without a suggestion from him, the Court cannot know on what point to make up the issue. Then, the question is, what is the proper course when the defendant will not plead. The plaintiff is not thereby to be deprived or delayed of a trial. In strictness we suppose the Court might proceed to a summary adjudication according to the course of the common law, and that prescribed in the Act of '77. But the practice, we believe, has been to call in a jury in such cases to ascertain the sum due the plaintiff, in the nature

of an assessment of the damages on a writ of enquiry, upon a judgment by default. Admitting the practice not to be founded on any express provision of the statute, yet it seems very proper in itself, as it is in aid of the judgment of the Court and violates no principle, but is conformable to the general preference of the law for a trial by jury, either in determining an issue of fact or in ascertaining damages. It cannot be erroneous to empannel a jury in such a case; for if the Court could, without a jury, give a summary judgment, there is no harm in adding to the judgment of the Court the sanction of finding by a jury. From the provision in the statute for a jury to try an issue joined on an appeal, the power incidentally arises to the Court to call in the aid of a jury to ascertain the debt, when there is no issue and the debt is uncertain upon the warrant. It follows that the plaintiff was entitled to judgment, though there was no issue, for if the Court was satisfied that the sum of money was due to the plaintiff, there should be judgment for it, whether the Court became thus satisfied by force, simply, of the evidence given in Court, or by that together with the concurring verdict of the jury.

PER CURIAM. Judgment affirmed.

WILLIAM KLINE *vs.* JOHN SHULER;

It is no objection to an action for malicious prosecution, that the party was arrested under a warrant having no seal; nor is it necessary in such an action to shew that the name of the person, who commenced the prosecution, was endorsed on the bill of the indictment as prosecutor.

Appeal from the Superior Court of Law of Macon County, Spring Term, 1848, his Honor Judge BATTLE presiding.

This is an action for maliciously prosecuting the plaintiff and causing him to be indicted for stealing some sheaves of oats from the defendant. Plea not guilty. On the trial the plaintiff gave in evidence a warrant issued against him for the offence by two justices of the peace, which was not under seal, but only signed by them, and the plaintiff further gave evidence, that the defendant made oath that the plaintiff stole the oats, and applied to the magistrates for the warrant; and that the plaintiff was arrested thereon, and, upon examination had, was bound over by the magistrate to Court on the charge and that the warrant and recognizances were duly returned. The plaintiff further gave in evidence the record of an indictment found for the larceny, and his subsequent trial, and acquital thereon, and also, that the defendant upon the return of the process to Court appeared as a witness against the plaintiff, and was the only one sworn and sent to the grand jury upon the indictment; and that, pending the indictment, the defendant made a bet with another person, that he would convict the plaintiff on the indictment. The counsel for the defendant insisted, that the warrant was void, because it was not under seal, and therefore that the defendant

could not be held responsible as the prosecutor on that, and that, for that reason, and because the defendant was not marked on the indictment as the prosecutor, and did not appear to have been a witness on the trial of the plaintiff, there was no evidence that the defendant was the prosecutor of the indictment; and he moved the Court so to instruct the jury. The Court refused the motion; and charged the jury, that the defendant could not avail himself of the want of a seal to the warrant as shewing that he did not cause the plaintiff to be prosecuted and indicted for the larceny; and that upon the warrant and record and the parol evidence, if believed by them, the jury might find, that the defendant was the prosecutor of the indictment if they were satisfied therefrom, that such was the fact. The jury found for the plaintiff, and the defendant appealed from the judgment.

J. W. Woodfin, for the plaintiff.
Edney, for the defendant.

RUFFIN, C. J. If the magistrates had discharged the plaintiff and the action were for maliciously charging the plaintiff with the larceny before them and causing him to be arrested therefor, it is not seen, that the defect in the warrant could have protected the defendant. For the charge alleged against the plaintiff was of an infamous offence, and the magistrates had cognizance of it as respected the arrest and examination of the person accused, and by the prosecution the plaintiff would have been prejudiced in his property and character. Upon those grounds it has been often held, that after the discharge of the accused this action will lie, if the proceedings, though defective, were maliciously prosecuted without probable cause, *Chambers* v. *Robison*, Str. 691. *Elsee* v. *Smith*, 1 Dow. and Ryt. 99. But that is not material here, since the action is for the malicious prosecution of the indictment. Now, the defence is, that the defendant was not, in point of law, to be taken as the pro-

secutor of it, because he was not endorsed as such on the bill and the plaintiff did not prove that the defendant gave evidence against him on his trial. But clearly those circumstances do not determine the defendants liability, as he may have promoted the prosecution and been the cause of it, though not avowedly the prosecutor, appearing of record. He is liable, if in point of fact, the indictment was preferred at this instance. To establish the affirmative, the circumstances, that the defendant in the first instance applied for a warrant against the plaintiff for the larceny and caused him to be arrested and bound over, and again attended and went before the grand jury as a witness against him and also made a wager that he would convict him on the indictment, certainly constituted evidence proper to be submitted to the jury. It not only tended to show, that the defendant caused the indictment to be preferred; but to most minds it amounts to sufficient and convincing proof. It is plain, that the defect in the warrant could not impair its force, as evidence to the point now under consideration, namely, the defendant's connexion with the preferring and prosecuting the indictment, for whether the warrant be good or bad, it was issued at the instance of the defendant and was the first move in the affair, which ended in the indictment for the same charge, and he offers nothing to show that he repented of his agency in making the accusation and separated himself from it before the indictment was sent. However, the sufficiency of the proof is not a question for the court, but was exclusively for the jury and was left to them; and our province is merely to say, whether the facts amounted to any evidence, on which the case could be left to the jury, upon which the opinion of the Court is decidedly in the affirmative.

Per Curiam. Judgment affirmed.

THE STATE vs. F. SLUDER.

Notwithstanding the Act of 1844, Ch. 12, declares that there shall be no jury trials in the County Court of Buncombe, yet the County Court there still retains its original jurisdiction in bastardy cases, and if the defendant tenders an issue, the case must be remove to the Superor Court by *certiorari* that the issue may there be tried.

The cases of the *State* v. *Carson*, 2 Dev. and Bat. 368, *Street* v. *Clark*, Tay. Rep. 15 and *Burke* v. *Morgan*, 5 Ire. 481 cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Fall Term of 1847, his Honor Judge SETTLE presiding.

The defendant was charged in Buncombe County with being the father of a bastard child, and was bound over to the County Court. He appeared and moved to be discharged, upon the ground, that the Court had no jurisdiction of the case. But the Court referred the motion, and made an order that the defendant should at certain stated days pay certain sums for the maintainance of the child, and also enter into bond in $200 with sufficient sureties for the performing of the orders of the court in the premises, and to indemnify the county against any charges for the maintainance of the bastard, from which the defendant appealed.

On motion of the Solicitor of the State, the Superior Court dismissed the appeal and awarded a *procedendo* to the County Court, to carry into effect the orders of that Court, from which the defendant again appealed to this Court.

Attorney General, for the State.
J. W. Woodfin, for the defendant.

RUFFIN, C. J. The question arises upon an Act of 1844, Ch. 12. It enacts that it shall not be lawful for the courts of Pleas and Quarter Sessions for Buncombe, and other ennumerated Counties, to try any causes, where a jury may be necessary nor to summon a jury to attend the courts. It further provides that all suits in those counties, whether civil or criminal, shall originate in the Superior Courts, and all appeals from justices of the peace in civil cases, and all recognizances by them taken in criminal cases, shall be returned to the Superior Court; and that when a will is brought into the County Court, for probate and is contested, a transcript of the proceedings, together with the original will, shall be sent to the Superior Court and the issue to be tried there; and that a certificate of the decisions and the will shall be remitted to the County Court and there recorded as evidence of the probate of the will or its rejection. A similar provision is made as to caveats of entries of land. Taking the Act of 1844 in connection with the general laws regulating the local police, as administed in the County Courts, and particularly with the bastardy act, it seems to the court, that, in the state in which this case was in the County Court, the jurisdiction of that court over it is not ousted. By the general act Rev. St. Ch. 12, the County Court is the tribunal to make the orders for the allowances necessary for the maintainance of a bastard child, and taking bond and security for the performance of the orders and indemnifying the County from charge therefor. It is true, an issue is allowed to the person charged, and an appeal is given to either side. But it has been the uniform course in cases of that kind, as in those of contested wills and road cases, after a decision in the Superior Court, to remit the cause with a certificate of the decision and directions to the County Court, to carry it into effect. That is obviously the more convenient and proper method of proceeding in all those cases, and in construing the act of 1844, it must be assumed, that

this couse was understood by the Legislature. These observations being premised, it seems to follow that the jurisdiction of a bastardy case remains exclusively in the County Courts, mentioned in that act, until the party charged deny that he is the father and an issue be made up, whether he be or not. In the first place it is to be remarked, that when cases are to go immediately to the Superior Court, the provision is made in explicit terms; and that this case does not fail within the words which transfer the jurisdiction to the Superior Courts. It is not an appeal from a justice of the peace, nor is it a civil suit that can originate in the Superior Court, nor as was stated in the *State* v. *Carson*, 2 Dev. and Bat. 368, is it a criminal case, but only a matter of police. Then, as no jurisdiction of this subject is directly conferred on the Superior Court, and, as far as the powers left to that Court, can extend, it must be exclusively exercised there. But it is said, as the defendant has a right to an issue, to be tried by a jury, and as the County Court, by the expressed words of the act, cannot have a jury, that Court at all events cannot retain the jurisdiction of this subject. That inference, however, is inadmissible, if any other construction be possible, because we have already seen, that the words of the act give no jurisdiction to the Superior Court, and, then, the effect would be, that neither Court could take cognizance of the case. But the duty of the Court is to receive the act in such a sense as will leave some Court open to the citizen in this, as in other cases, and to mould the proceedings in such a way as will ordinarily afford the most direct and cheapest remedy to both the public and the accused. Now, the difficulty suggested, in respect of the trial of an issue, can only arise when the party asks for one. If therefore, this party had been sent up to the Superior Court, instead of the County Court, what end would it have answered? None, whatever, but the idle one of his being immediately sent down to the inferior Court, in order there to have the proper

bastardy orders passed and bonds taken. It would be simply a case of doing and undoing to no purpose. It is much better, that the case should go to the County Court in the first instance for the proper orders and bond, because there every thing, that is necessary can be done, unless the accused should interpose an application for an issue, and even then, those orders, must ultimately be made there. Until an issue, there is not a case to be tried by a jury. But it is asked, what is to be done, if the party tender an issue. It would be sufficient to say that it is not necessary to determine that point, as it has not arisen in this case. But as it has a bearing on the interpretation of the act, it seems proper to consider it. It may be admitted that, perhaps, it would have been better in that event, if the act had expressly provided for transmitting the case for trial in the Superior Court on a transcript from the County Court, as is done in respect of caveats of wills and entries. But the omission of a clause of that kind ought not to defeat the accused of his right to deny that he is the father of the child, nor defeat the County of the right to have the issue tried some where, so that if found against the party, he may be compelled to maintain his own offspring. No doubt, the issue cannot be tried in the County Court, because the power of trying a jury cause is expressly prohibited to that Court; then it can only be tried in the Superior Court; and, as the statute provides no method for taking the case into that Court, it is only by the common law writ of *certiorari*, that it can be done, and, *ex necesitate*, it must be done in that way. At common law not only convictions are *re-examined* on that writ, but causes pending in inferior Courts are brought up to higher courts for trial, in order that there may be more sure and speedy justice. Bac. Abr. *certiorari*, A. 2 Hale P. C. 210, 4 B. Com. 320. This latter use of the writ has not prevailed in this State, because our law has provided the different method

of appeal for obtaining a trial on the merits in the Superior Court. *Street* and *Clark*, Tay. Rep. 15. But it has been frequently used here whenever requiste to prevent the failure of justice, as in cases of persons affected in interest by ex parte proceedings. *Perry* v. *Perry*, 91 Ca. T. R. 184, or in other cases, where an appeal lies. *Brooks* v. *Morgan*, 5 Ired. 481, and while at common law *certiorari* laid in every case, (in which it is not expressly taken away) in order to prevent a partial and insufficient trial, and may be applied for by either the sovereign or the defendant, it cannot but be, that it must be extended here to a case like this, in which there cannot be a trial at all by any other means.

Judgment affirmed; and this will be certified to the Superior Court, that a *procedendo* may issue thence to the County Court.

PER CURIAM. Ordered accordingly.

SILAS McNEELEY *vs.* SAMUEL HART.

Articles of personal property, sold under execution, must be actually present, but they need not be literally in the sheriff's hands or directly under his hammer; it is sufficient if they are in such a situation, that the bidders can see them and have an opportunity of examining their quality and value.

Upon the facts stated in evidence, the Court should instruct the jury, if they believed the evidence, as a matter of law, that such facts did or did not make the property legally present. The Court should not leave that conclusion to the jury as a matter of law.

The fact, that an article of personal property had been previously, on the same day, shewn to the bidders, cannot avoid the effect of their absence at the time and place of the sale.

The sale must be conducted in such a manner, that every person, who may come up before the article is knocked down by the auctioneer, may see and examine it, so as to enable him to become a bidder, if he choose.

The cases of *Hollowell* v. *Skinner*, 4 Ire. 165, *Ainsworth* v. *Greenlee*, 3 Mur. 470, *Smith* v. *Tritt*, 1 Dev. & Bat. 241, and *Skinner* v. *Skinner*, 4 Ire. 175, cited and approved.

Appeal from the Superior Court of Law of Iredell County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

This was action of trover for the conversion of a quantity of corn and oats. The defendant pleaded not guilty, and, upon the issue thereon joined, the case was tried at Iredell, on the last Circuit.

The plaintiff claimed title to the property in question under a conveyance which, it was admitted, was void as against creditors and purchasers. The defendant claimed by purchase at a Sheriff's sale, made subsequently to the conveyance to the plaintiff, under certain executions against the vendor. It was contended for the plaintiff, that the sale made by the sheriff was irregular and void, and that therefore the defendant was not such a purchaser, as could avoid the plaintiff's conveyance. The tes-

timony to show this was, that the corn was sold in a field, only a part of which was visible from the point where the sale was made, and that the oats were sold by the bundle, lying in a barn upon the premises, at the distance from the place of sale of several hundred yards, according to one witness, or of a quarter of a mile according to another. There was further testimony that other property was sold on the premises upon the same occasion, and that the bidders had had an opportunity of examining the oats and corn, which had been pointed out to them.

The Court instructed the jury that to make a sheriff's sale of personal chattels valid, it was not necessary that the sheriff should have them literally in his hands or under his hammer; it was sufficient if they were present in such a situation that the bidders could have a fair opportunity to inspect and examine them, and to ascertain their quality and value. The Court then left the validity of the sale to the jury, as a question of fact, and instructed them, that, if the sale were found to be valid upon the principles above stated, they should find for the defendant; otherwise for the plaintiff. A verdict was returned for the defendant, and from the judgment rendered thereon the plaintiff appealed.

Osborne, for the plaintiff.
Clarke, for the defendant.

BATTLE, J. There can be no doubt, that, if the sheriff's sale, under which the defendant purchased, were void, the plaintiff was not bound by it. His donor could certainly have taken advantage of it, and he, claiming from the donor, and standing in his place, must have had the same right. *Hollowell* v. *Skinner*, 4 Ire. Rep. 165. The question then arises, whether the sale, at which the defendant purchased, was void. It is attacked upon the ground, that the articles sold were not present at the time and place of the sale. The presiding Judge held properly, that they must be present, and equally so, that

they need not be literally in the sheriff's hands or directly under his hammer—that it was sufficient, if they were in such a situation, that the bidders could see them and have an opportunity of examining their quality and value. *Ainsworth* v. *Greenlee*, 3 Mur. Rep. 470, *Smith* v. *Tritt*, 1 Dev. & Bat. Rep. 241; but he erred in leaving, as a question of fact to the jury, what he ought to have decided himself, that, if they believed the testimony to be true, the oats at least were not present according to the principles, which he had so clearly and properly laid down. According to the testimony of one witness, the oats were in a house on the premises, several hundred yards, and according to another a quarter of a mile from the place where the sale was made. The bidders could not at the moment see them, nor examine their quality and value, and of course were invited to bid in ignorance of these essential particulars. Nor can the fact stated, that the articles sold had been previously on the same day shewn to the bidders, avoid the effect of their absence at the time and place of the sale. For that must be conducted in such manner, that every person, who may come up before the articles are knocked down by the auctioneer, may see and examine them, so as to enable him to become a bidder if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition, which the law so much desires in sales of this kind. For the error of the Judge in failing to instruct the jury on a question of law, material to the plaintiff's claim, which was presented by the testimony, there must be a new trial. This renders it unnecessary that we should consider whether the sale of the corn was valid.

Indeed the facts respecting the sale of that article are not stated with sufficient fullness and precision to enable us to decide that question. The case does not mention whether the corn was standing or lying in heaps in the field, when it was sold, whether it was sold all together,

or by the bushel or other measure, nor how much of the field could be seen by the bidders from the spot where the sale took place. It was not necessary that the sheriff and bidders should have been in the field or immediately at it, *Skinner* v. *Skinner*, 4. Ired. Rep. 175, but they ought to have been in such a situation, that they could see the probable quantity and quality of what they were called upon to buy. These facts may be ascertained upon the next trial, when the Court will be prepared to pronounce the law applicable to them.

The judgment must be reversed and a *venire de novo* awarded

Per Curiam. Judgment reversed and *venire de novo*.

WILLIAM W. BRADHURST vs. A. H. ERWIN.

A writ was executed on A. and B. and the sheriff took from them a bond with a condition "that if the above bounden A. and B. do make their personal appearance before the Judge of the Superior Court of Law, *&c.*, then and there to answer, &c., and there to abide the judgment of the said Court, and not depart the same without leave first had and obtained, and if the securities shall well and truly discharge themselves as special bail of the said A. and B. then the obligation to be void, &c." Afterwards a *nol. pros.* was entered as to A. and a judgment obtained against B. *Held*, that this bond did not constitute A. the bail of B.

The case of *Clark* v. *Walker*, 3 Ire. 181, cited and approved.

Appeal from the Superior Court of Law of Burke County, at the Spring Term 1848, his Honor Judge Battle presiding.

This was a *scire facias*, issued by the plaintiff to subject the defendant as the bail of one J. J. McElrath, and was submitted to the Court upon the following case agreed. The plaintiff sued out a writ of trespass on the case in assumpsit against the present defendant, and J. J. McElrath, which was delivered to the sheriff of Burke County, who executed it on both the defendants therein and took from them a bond payable to himself for the sum of eight hundred dollars with the condition "that if the above bounded J. J. McElrath & A. H. Erwin, do make their personal appearance before the Judge of the Superior Court of law to be held for the County of Burke at the court house in Morganton on the 7th monday after the 4th monday in March next, then and there to answer William W. Bradhurst of a plea of trespass on the case to the plaintiff's damage four hundred dollars, and there to abide by the judgment of said Court, and not depart the same without leave first had, and if the securities shall well and truly discharge themselves as special bail of said McElrath and Irwin, then this obligation to be void, else to remain in full force and virtue." This bond was assigned by the sheriff to the plaintiff in the usual manner. The writ was returned to the Spring Term 1840 of the Superior Court, at which the defendants appeared by their Attorneys and entered their pleas to the action. Afterwards at the Fall Term 1845 of said Court, a judgment of non-suit was given against the plaintiff which, on his motion, was set aside as to McElrath, but not as to the present defendant Erwin, and at a subsequent term to-wit, Spring Term 1846, of said Court, the plaintiff obtained judgment against the said McElrath for the sum of $413 32-100, of which sum $296 46 100 was principal, to bear interest from 21st April 1846. Upon this judgment a *ca. sa.* was issued against the defendant therein and returned "not to be found;" whereupon the present *sci. fa.* was sued out upon the above mentioned bond, to subject the present defendant Erwin to the payment of

the said judgment against the said McElrath as his special bail. Upon the return of the *sci. fa.* the defendant appeared by his attorney and pleaded "*nul tiel record*" and "*non est factum.*" If the Court be of opinion that the plaintiff is entitled to a judgment on his *sci. fa.* against the defendant, Erwin, then a judgment for the sum of $413 33-100 with interest on $296 46-100 from 26th April 1846 until paid, is to be entered for him, but if the court be of opinion that the defendant Erwin cannot be subjected as bail for the said McElrath, then a judgment of non suit is to entered. The Judge presiding in the Court below was of opinion, that the defendant, Erwin, could not be subjected as bail for McElrath, and gave a judgment of nonsuit from which the plaintiff appealed.

N. W. Woodfin, for the plaintiff.
Avery for the defendant.

BATTLE, J. We concur in the opinion given upon the case agreed by the presiding Judge in the Court below. The plaintiff's counsel has contended, that, as the writ in the original suit was against both McElrath and Erwin, and they, upon being arrested gave a joint bond to the sheriff for their appearance to answer the action, they thereby became mutually bound as special bail for each other, and that consequently Erwin can be subjected in this manner as the bail of McElrath. But that cannot be so, because the obligation of Erwin, as a principal, is very different from what would be his obligation as special bail for the appearance of his co-defendant McElrath. As principal, he was bound to appear, answer the action and stand to and abide the judgment of the Court. From that he was discharged by the judgment of nonsuit, against the plaintiff as to him. As special bail, he ought to have had the right secured to him by the bond of discharging himself, as such by the surrender of his principal or otherwise according to law.

But such are not the terms of the bond either express or by any fair implication; and, that being so, he cannot, according to the decision upon this point in the case of *Clarke* v. *Walker*, 3 Ired. Rep. 181, be subjected by the plaintiff as the special bail of McElrath.

We decline giving any opinion upon the question whether the sheriff himself can have any remedy upon the bond, if he should be subjected as special bail for McElrath, in consequence of his having failed to take special bail upon making the arrest in the original suit.

PER CURIAM. Judgment affirmed.

TIMOTHY RAGSDALE *vs.* ALEXANDER WILLIAMS.

Any act of ownership over personal property taken, which is inconsistent with the owner's right of dominion over it, is evidence of a conversion.

But where no *act* is done, where there is no refusal to deliver, and no claim of right to the property, where in truth the defendant is wholly passive; though the property was found in his possession, this, *per se*, does not subject the defendant to an action of trover.

Appeal from the Superior Court of Law of Iredell County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

Case in trover for a wagon. Property in the plaintiff was admitted. The plaintiff hired the wagon to one Baily, who swapped it away to a man by the name of Dowell. The latter, upon a visit to the defendant, who is his father-in-law, drove the wagon in question and left

it on his premises, where it was found by the plaintiff and claimed. The defendant told him how Dowell had brought it there, and how the latter had come by it, according to his statement, and where he might be found, and expressed a hope, that Dowell and Baily might recant their bargain and the plaintiff get his wagon, provided Dowell got back the horse he traded for it. The plaintiff made an affidavit before a magistrate, stating the transaction and also that the wagon was in possession of Dowell. This affidavit was read by him to a company assembled at the Defendant's, and a demand was made of the wagon, but of no particular person. Upon its being read the defendant observed, "Dowell has no possessions here, these are my possessions." He further stated, the plaintiff did not understand the laws of North Carolina, as well as he did; that by those laws, if a man loaned a thing and it was sold, the owner could not get it back again. It was also testified by a witness, that the defendant said on that occasion, "keep the wagon Dowell; I will see you out." Dowell removed from that part of the County and nothing further was seen of the wagon. It was further in evidence, that, when the plaintiff returned from the defendant's he was asked if the latter set up any claim to the wagon, who replied he did not, but claimed that it was in his possession. It was insisted by the defendant's counsel, that there was no evidence of a conversion by the defendant, and, if there were, it was not for his own use and benefit, and therefore the plaintiff could not recover of him, and asked his Honor so to instruct the jury, which was refused; and his Honor charged, that it was not material for whose use the conversion was made; if the defendant deprived the plaintiff of the property; refusing to deliver it on demand, or if he co-operated with Dowell in conveying it away and withholding it from the owner, he would be liable. Mere arguments on the part of the defendant, in favor of his own rights, would not amount to such a co-operation;

there must be some concert of understanding and action, by which a joint conversion is effected and in that case a joint liability would follow. The action of trover is an action of *tort*, and the whole *tort* consists in the wrongful conversion. To entitle the plaintiff to a recovery, he must show a right of property in himself either general or special, and a wrongful conversion by the defendant. In form it is a fiction; in substance a remedy to recover damages, for the property so converted.

There was a verdict and judgment for the plaintiff, and an appeal.

Guion, for the plaintiff.
Clarke, for the defendant.

Nash, J. The only question in this case is as to the conversion, the plaintiff's title not being disputed. Any act of ownership over the property taken, which is inconsistent with the true owner's right of dominion over it, is evidence of a conversion. Thus an asportation of the goods for the use of the defendant, or of another person, is a conversion, because it is inconsistent with the general right of dominion, which the owner has in the chattel. So also if A. is in possession of a horse or other chattel property, belonging to B., and upon demand refuses to deliver it, this refusal is evidence of a conversion, because there is an assertion of right inconsistent with B's, of general dominion over it. 3 *N. N. P.* 2667. 1 *Dowell* 86. In this case, the defendant did not take the wagon, it is found on his premises; he neither refused to deliver it, nor is there evidence of any act of ownership over it exercised by him. On the contrary, he disclaims all ownership, and tells how it came on his premises and acknowledges the right of the plaintiff. For although he gives it as his opinion, that, by the exchange between Bailey and Dowell, the plaintiff had lost his right to the wagon and Dowell had acquired it; yet he states

LAW LIBRARY OF University of MICHIGAN.

how the latter had acquired it, showing plainly that he was mistaken in his opinion, and that the right still remained in the plaintiff. In the first conversation between the plaintiff and defendant, then, nothing occurred to put the defendant in the wrong. In the second, the plaintiff and the defendant and Dowell are all present with the waggon, the true owner, the man on whose premises the waggon had been left, and he who had brought and left it there. A demand was made by the plaintiff, but on no one in particular. Upon the affidavit being read, asserting the waggon to be in possession of Dowell, the defendant observes, "Dowel has no possession here, these are my possessions." They were then on the premises of the defendant and he asserted nothing but the fact; still there is no assertion of title on the part of the defendant and no refusal to deliver the waggon, nor offer or threat to prevent the plaintiff from taking possession There is, then, at this time no conversion or evidence of it. It is stated by Baron Alderson in *Foulds* v. *Willoughly*, 1st Dowl. 86 "if an *act*, is done, which does not call in question my general right of dominion over the chattel, it is no conversion". Here no act is done by the defendant from first to last, no refusal to deliver, no claim of right to the property; in truth throughout the whole transaction the defendant was entirely passive. We think, therefore, his Honor erred in refusing the first part of the instruction required. We concur with him in his charge, that it was not material, for whose use the conversion was made, (if made at all.) In *Shipwick* v. *Blanchard*, 6 Term Rep. 298, it is decided, to "maintain trover, the goods, must be taken or detained with intent, to convert to the takers own use or the use of some other person. We agree further with his Honor in the latter part of the charge, but there was no evidence that the defendant aided or assisted Dowell to take off the waggon.

For the error pointed out, in the refusal to instruct the Jury, as required, there must be a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo* awarded.

DEN ON DEMISE OF JOHN McDOWELL *vs.* JAMES R. LOVE.

Where, in ejectment against a tenant, a person comes in, and is admitted to defend, upon his affidavit "that the premises in dispute were his, that the tenant alleged to be in possession was his tenant, and that he was the landlord of the premises sued for;" it is not necessary for the plaintiff to prove that the defendant was in the actual possession of the premises, that being considered as admitted by the landlord, when he applied to be made a defendant.

The cases of *Albertson* v. *Redding*, 2 Mur. 283, *Gorham* v. *Beeman*, 2 Dev. 174, *Carson* v. *Burnett*, 1 Dev. & Bat. 560, and *Belfour* v. *Davis*, 4 Dev. & Bat. 310, cited and approved.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term, 1848, his Honor Judge BATTLE presiding.

This was an action of ejectment, brought originally against one Joseph Chambers as tenant in possession, but in which the present defendant was afterwards permitted to come in and defend as landlord upon the following affidavit. "James R. Love comes into Court and swears that the premises in dispute are his, he being the sole tenant of said premises; that Joseph Chambers, went into possession as subtenant of his tenant, E. Chambers, that

affiant swears that said subtenant has no title, and the same solely exists in this affiant, who is the landlord of the premises sued for.

The lessor of the plaintiff claimed under a grant from the State issued in 1810, which covered all the land mentioned in his declaration. The defendant claimed under a prior grant issued in 1805, which covered all the land contained within the boundaries of the lessor's grant, except a very small slip, as to which, however, there was no evidence, besides the defendant's affidavit, that he or his tenant was in possession at the commencement of the suit, or at any other time. The principal contest was, whether the plaintiff's lessor had not acquired the better title, by an adverse possession of seven years, of the part covered by the defendant's grant, of which it was not denied that his tenant was in possession when the suit was brought. But the lessor insisted that, however the jury might find as to that, he was entitled to a verdict for the small slip of land not covered by the defendant's grant, upon the ground that by coming in to defend as landlord upon affidavit, the defendant had admitted himself to be in possession, and that no evidence of that fact was necessary on the trial. The Court held otherwise, and the jury found a verdict for the defendant. The lessor of the plaintiff moved for a new trial for misdirection in the particular above stated, which was overruled, and a judgment given, from which he appealed.

N. W. Woodfin, *J. W. Woodfin*, and *Bynum*, for the plaintiff.

Francis, for the defendant.

Battle, J. Ever since the decision of the case of *Albertson* v. *Redding*, 2 Murph. Rep. 283, S. C. 1 Ca. Law Rep. 274, it has been considered the settled law of this State, that, in all cases of ejectment, whether the consent rule be general or special, the lessor of the plaintiff is

bound to prove the defendant to be in possession of the premises, which he seeks to recover. This is placed upon the ground that the defendant's being in possession of the premises is a material allegation of the plaintiff's lessor, which it is incumbent upon him to prove; and that the consent rule, by which the defendant is permitted to defend, upon confessing lease, entry and ouster, does not supersede the necessity for such proof. But the rule is different, where the defendant makes a distinct admission, before suit is brought, that he was in possession, as in the case of *Mordecai* v. *Oliver*, 3 Hawks Rep. 479; or where one, upon his own motion, procures himself to be made a defendant, in an action brought against another as in *Gorham* v. *Brennon*, 2 Dev. Rep. 174: so, in the case of *Carson* v. *Burnet & Mills*, 1 Dev. and Bat. Rep. 560, it was said by the Court *arguendo*, that it might not be necessary to prove the tenant to be in possession of of any particular place as against the landlord, who admits him to be in possession, as his tenant, by engaging to defend him. The distinction between the necessity of proof of possession, as against the tenant and not as against his landlord, is founded upon this, that the tenant is brought involuntarily into Court by the plaintiff's lessor, while the landlord comes forward of his own accord and admits the possession of his tenant. In the case before us, the defendant, Love, came into Court and swore that the "premises in dispute," were his; that Joseph Chambers went into posession as subtenant of his tenant, E. Chambers, and that he was the landlord of the premises sued for. His own affidavit therefore supplied the proof of his tenant's possession of *all* the land contained within the boundries descirbed in the plaintiff's declaration. It is true that it is said, in *Belfour* v. *Davis*, 4 Dev. and Bat. Rep. 300, that a landlord, who is admitted to defend with, or in the stead of his tenant, stands in his place, and is entitled to his rights and subject to his disadvantages; but that is with respect

to the title, and not to the proof of possession, which he admits by the very fact of coming forward to defend the suit. Whether, when the tenant is in possession of, and claiming as such, only a part of the land sued for, the landlord would be permitted to come in upon this affidavit and defend only for such part, it is unnecessary for us to decide, as the question is not presented in the case now under consideration.

The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Ordered accordingly.

GILBERT PRESNELL *vs.* JACOB RAMSOUR.

Where a man, who purchases land at an execution sale, enters upon the premises, the original owner being in possession, he cannot justify this trespass, on the mere ground that he was the purchaser at the sale, when he had not received the sheriff's deed till after the time of the alleged trespass.

The sheriff's deed has relation back to the time of the sale, as to the title, but not as to the action of trespass founded on possession.

The cases of *McMillan* v. *Hafley*, 2 Car. L. R. 89, *Davis* v. *Evans*, 5 Ire. 525, *Davidson* v. *Frew*, 3 Dev. 3, *Pickat* v. *Pickat*, 3 Dev. 6, and *Dobson* v. *Murphey*, 1 Dev. & Bat. 586, cited and approved.

Appeal from the Superior Court of Law of Lincoln County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

This was an action of trespass *quare clausum fregit*, commenced in the County Court of Lincoln, at the December Term, 1846 of which the defendant appeared and pleaded not guilty; and afterwards, upon the trial of the

issue, the defendant obtained a verdict and judgment, and the plaintiff appealed to the Superior Court. In that Court the case came on for trial, at the Fall Term 1847, when the plaintiff proved, that in August 1846, he was in possession of a house and a lot, into the latter of which the defendant entered, drove out the plaintiff's stock and fastened up the gate.

The defendant then introduced testimony on his part to show, that the house and lot once belonged to a man named Moornean against whom a judgment was obtained, and, upon an execution issuing thereon, the sheriff sold the house and lot in June 1846, when the defendant became the purchaser, but did not take a deed from the sheriff until July 1847.

The defendant contended that the title to the house and lot passed to him by the sheriff's sale, in June 1846, and the deed was a mere authentication of the fact, but that at all events, the deed, executed in July 1847, related back to the sale, so as to enable him to justify the trespass. A verdict was taken for the plaintiff, subject to the opinion of the Court, upon the question, as to the effect of the sheriff's sale, and relation of the deed. The Court being of opinion, in favor of the plaintiff, upon the question, gave judgment on verdict, and the defendant appealed.

Guion, for the plaintiff.
Thompson, for the defendant.

Battle, J. The opinion given by the Judge in the Court below is fully sustained by the cases *McMillan* v. *Hafley*, 2 Cr. L. Rp. 89 and *Davis* v. *Evans*, 5 Ire. Rp. 525, cited by the plaintiff's counsel. In the first of these cases, the defendant claimed from the defendant in the execution, under which the plaintiff purchased, and committed the trespass complained of, between the time of the sheriff's sale and his execution of a deed to the plaintiff. The Court held,

that as the plaintiff was not in actual possession and had no title in law, at the time of the commission of the trespass, he could not be considered as having a constructive possession, and consequently could not maintain the action. It is true that the correctness of this decision was doubted by HENDERSON, Chief Justice, in *Davidson* v. *Frew*, 3 Dev. Rep. 3, but he expressly declined to overrule it. The cases of *Davidson* v. *Frew*, *Picket* v. *Picket*, 3 Dev. Rep. 6 and *Dobson* v. *Murphy*, 1 Dev. and Bat. Rep. 586, referred to and relied upon by the defendant's counsel, all shew that a sheriff's deed, when fairly executed at any time after the sale, has relation to it and operates to pass the title from that time. But in neither of them is it held, that this relation will have the effect of giving the purchaser such a constructive possession, as will enable him to maintain the action of trespass for an act committed before he has taken actual possession, or obtained a deed. And we may infer from the case of *Davis* v. *Evans*, 5 Ired. Rep, 529, that such relation would certainly not be allowed to sustain an action commenced before the deed was executed. In that case, which was an action of ejectment, it was said expressly, that "whatever relation to the time of the sale a conveyance from the sheriff may have for some purposes, it cannot be carried to the unreasonable extreme of proving the title in an action, that was brought before the deed was executed."

If that be so in the action of ejectment which is founded on title, it is certainly so in the action of trespass, which is founded on possession; and the same principle will apply *e converso*, when the purchaser is sued for a trespass and pleads not guilty or *liberum tenementum*, before he has taken the deed. It cannot have the effect to put him into constructive possession, by relation, so as to enable him to support his plea. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

MARY H. SMITH vs. JAMES H. DAVIS.

In trover for a slave, it appeared that the plaintiff had had possession of the slave for more than three years, and that at the time she took possession she executed to the owner an obligation with the following condition, "that whereas the said Mary H. Smith hath this day received of said Houston a negro girl named Nell, which the said Smith is to have the entire service and peaceable possession of during her natural life for the sum of $350 to him in hand paid by the said Smith; now if the said Smith shall keep the said negro and her issue (if any) in the County and State aforesaid and sufficiently clothe and feed them and humanely treat them during their time of service, and the said Smith or her executors shall before or at her death return said negro or negroes to said Houston," &c. *Held*, that the plaintiff had a title to the slave and her issue during her life.

Appeal from the Superior Court of Law of Mecklenburg County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

The action is trover for a female slave, Nelly, and several of her children. Plea not guilty. At the trial the plaintiff gave evidence that, in June 1827, she came into possession of the woman, and continued in possession of her, claiming her as her own for the term of her life, until November 1844. The other negroes were the children of Nelly, born in the possession of the plantiff, and held and claimed by her in like manner as their mother. At the latter period the defendant took the negroes from the plaintiff's possession and carried them to Mississippi.

The defendants then gave evidence, that they claimed under one R. B. Houston; and further gave in evidence an obligation from the plaintiff to Houston dated June 16th, 1827, for the penalty of $350, with a condition as follows:

"The condition of the above obligation is such that, whereas the said Mary H. Smith hath this day received of said Houston a negro girl, named Nell, which the said Smith is to have the entire service and peaceable possession of during her natural life, for the sum of $350 to him in hand paid by the said Smith, the receipt whereof is acknowledged by the said Houston; now if the said Smith shall keep the said negro and her issue (if any) in the County and State aforesaid and sufficiently clothe and feed them and humanely treat them during their time of service, &c., and the said Smith or her executors shall before or at her death return said negro or negroes to said Houston," &c.

Thereupon the counsel for the defendant prayed the Court to instruct the jury that the title to the slaves was in Houston, and that the plaintiff's remedy was against him for the breach of his executory agreement, and that she could not maintain this action against the defendant. But the Court refused to give the instruction, and from a verdict and judgment for the plaintiff for the value of the negroes for her life, the defendants appealed.

Osborne, and *Wilson*, for the plaintiff.
Bynum, and Alexander, for the defendant.

RUFFIN, C. J. This seems to be as plain a case for the plaintiff as can be. She has the property in the slaves both under the Act of 1792, which makes parol sales of slaves valid, when accompanied by actual delivery, and that of 1820, which makes adverse possession for three years a good title, excepting only in the case of oral gifts. That the plaintiff claimed under a sale, and not a gift, is clear. It is true, she did not call witnesses directly to the fact of her purchase, nor does she produce a receipt under her vendor's hand for the price.

But the defendants established the fact for her by their own evidence. They produce from Houston the plain-

tiff's obligation to him for the proper treatment of the slaves and their delivery at the plaintiff's death; wherein it is recited that the obligee, Houston, had sold the girl to the plaintiff at the price of $350, and that she had paid the same and received the negro. We say that the instrument recites a sale, because it says, the plaintiff had received the negro from Houston and paid for her, and was "to have the entire service and possession" of the negro; and it is difficult to tell what is property in a slave if the right to the exclusive possession and service be not, whether it be for years or for life or for ever. But it is said, that a life estate merely in a slave cannot be created orally, but that a deed or writing is required by the Act of 1823. That is admitted, without at all weakening the plaintiff's case. For, the whole effect of the argument is, that, although the parties intended for her only a life estate, yet that the legal operation of the transaction was to give her the absolute property at law. We think it very probable that the parties perfectly understood that such was the legal effect; as that would rationally account for the obligation coming from the plaintiff, reciting that she had purchased but a life interest, and obliging her to have the negroes delivered at her death, instead of such an obligation or executory contract on the part of Houston as the legal owner, to let the plaintiff have the use or enjoyment of the negro for life. This circumstance makes this case the converse of *Smith* v. *Hargrave*, 3 Hawks 560, in which Smith received an absolute conveyance for the slave from Buckhart and at the same time executed the instrument granting the sevices of the negro to Buckhart for life; and it was held that Smith did not intend thereby to part from the property in the slave, because, being for the life of the grantee, it would, in effect annul the whole transaction and place the parties as if no deed had been made at all. But here the instrument is executed by the plaintiff, not to give a life estate, or the ser-

vices for life to another, but to declare that she is really entitled to the possession and services of the slave but for her life, and contracting then to return, reconvey, her and her issue to the former owner. If, therefore, *Smith* v. *Hargrave* was law, which was much doubted, it rather supports than meditates against the plaintiff's title; for, if she had not the title at law, the natural course would have been that Houston should give her some instrument, as permanent evidence of his obligation to allow her the enjoyment, rather than that she should give the obligation she did to him. The executory contract, was really from her to him, and not *vice versa*, and the judgment ought to be affirmed. It is to be remarked, although the plaintiff may have had the absolute legal title, that no injustice has been done by the verdict ascertaining the damages against the defendants who claim under Houston, since it expressly stated that the plaintiff on claimed damages for the conversion for her life.

PER CURIAM. Judgment affirmed.

A. FITCH vs. MARY PORTER.

To support a declaration in an action of debt upon a judgment, the exemplification of the judgment itself must be produced; it is not sufficient to shew a *sciari facias* to shew cause why execution should not issue on the judgment and an award of execution according to the *sci. fa.*

Appeal from the Superior Court of Law of Mecklenburg County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

This was an action of debt upon a judgment obtained by the plaintiff against the defendant in the Court of Common Pleas for Richland District in the State of South Carolina. Plea, *nul tiel record*. Upon an inspection of the exemplification of the record produced by the plaintiff, it appeared to be an execution issued the 10th day of June, 1829, on a judgment recited therein to have been confessed by the defendant to the plaintiff for the sum of $260 50-100 with interest and costs; and two *scire faciases* issued in the years 1845 and 1846 against the defendant, to show cause why the plaintiff should not have his execution against her upon the said judgment, with the sheriff's returns of "*nihil*" thereon, and then an award of execution by the Court. The Court below adjudged that there was no such record and the plaintiff appealed.

Bynum and *Wilson*, for the plaintiff.
Osborne, for the defendant.

BATTLE, J. The Court below was undoubtedly right in deciding, that there was no such judgment as that upon which the plaintiff declared. The exemplification of the record produced showed no judgment at all, but merely an award of execution upon a judgment recited therein to have been before rendered, but the judgment itself was not produced. The plea of *nul tiel record* put in issue the judgment declared upon, and the plaintiff was bound to produce an exemplification of it in support of the affirmative of his plea. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE UPON THE RELATION OF ROBERT W. ELLIS vs. RICHARD W. LONG & AL.

A, having a writ served upon him, placed in the hands of the sheriff who served the writ a sum of money to discharge the debt for which he was sued, but the sheriff neglected to apply it for that purpose and A. was compelled to pay the debt out of other funds. *Held*, the sureties of the sheriff were not bound to A. for such neglect.

The cases of *Kesler* v. *Long*, 7 Ire. 379, and *State Bank* v. *Twitty*, 2 Haw. 5, cited and approved.

Appeal from the Superior Court of Law of Rowan County, at the Spring Term, 1848, his Honor Judge MANLY presiding.

This was an action of debt upon a bond, executed by the defendant Long, on the 5th of August 1844, for the discharge of his official duties as sheriff of the County of Rowan, and by the other defendants as his sureties. The breaches assigned were first, that the defendant Long as sheriff had received from the relator the sum of $636 to be applied to the payment of a debt due to Charles Dewey, cashier, upon which a *capias ad respondendum* was issued against the relator, and came to the hands of the said defendant, and that he had failed to apply the said money as directed, so that the relator was compelled to pay the same a second time, and secondly, that the said money was in his hands after an execution had been issued and come to his hands on a judgment recovered for the said debt, and that he had failed to apply it in satisfaction of the said execution, whereby the relator was compelled to pay it again. Pleas *non est factum* and conditions performed and not broken.

On the trial, the relator, in support of the breaches assigned, introduced testimony to show, that, on the 26th of January 1844, a writ of *capias ad respondendum*, which

had issued from the Superior Court, of Law for Wake County, returnable on the 4th Monday of March 1844, against the relator, in favor of Charles Dewey cashier, was placed in the hands of the defendant, Long, as sheriff of Rowan County, and that, on the 22d day of March in the same year, the relator handed to the said Long, the sum of $636, and took his written receipt therefor, expressing therein, that it was to be paid on a writ, Charles Dewey, cashier, against the relator. He showed further that the said writ was returned "executed," by the said Long; that at the Fall Term following of Wake Superior Court, a judgment was obtained against the relator for $655 50-100, and that an execution of *fi fa* was issued thereon and placed in the hands of the said Long and was never returned by him, and that, subsequently, on the 3d of February 1846, the relator was compelled to pay the amount of said judgment on an execution directed to the sheriff of the County of Davidson. There was some other testimony given which it is unnecessary to state as it does not at all affect the case in the view taken of it by the Court.

The defendants contended, that, upon the testimony given for the relator, he could not recover in this action. A verdict was taken for him, however, subject to the opinion of the Court, as to whether the action could be sustained, upon which his Honor, being of opinion against the relator, directed the verdict to be set aside and a non-suit entered from which the relator appealed.

Clarke, for the plaintiff.

Craige, Osborne and H C Jones, for the defendants.

Battle, J. We agree with his Honor that this action cannot be sustained. At the time when the money was placed by the relator in the hands of the defendant Long, he had no right to receive it in his official capacity. The precept, which he then had, commanded him to take

the body of the relator and to keep him safely to answer the action, but it gave him no authority to receive the relator's money. The sheriff then was but the private agent of the party to pay the debt, and he alone is responsible in his private capacity for his breach of trust. It is well known to the profession that, prior to the year 1818, Constables and their sureties were not liable on the official bonds of the former for money paid to them without suit, on claims put into their hands for collection; and that an Act was passed in that year, 1 Rev. Stat. Ch. 24 Sec. 7 to make them and their sureties liable, whether the money were paid with or without a suit. Even to this day, neither constables nor sheriffs are liable officially for money collected by them on notes above the jurisdiction of a single justice. *Kesler* v. *Long*, 7 Ired. Rep. 379. The same principle is applicable to this case. But it is contended by the plaintiff's counsel that the defendant, Long, had the money when the execution came to his hands, and that he afterwards held it officially, and he cites the case of the *State Bank* v. *Twitty*, 2 Hawks Rep. 5 as in point. But unfortunately for the argument and the authority there is no evidence, that the money was in Long's hands after he received the execution. That was never returned by him much less returned "satisfied," as in the *State Bank* v. *Twitty*. The law certainly will not raise the presumption, that he kept the money for more than six months. in the absence of any proof to show it. The judgment must be affirmed

PER CURIAM. Judgment affirmed.

N. G. HOWELL vs. P. EDWARDS.

In an action for maliciously arresting a party and holding him to bail, the declaration must shew a legal determination of the original action.

Appeal from the Superior Court of Law of Cherokee County, at the Fall Term of 1847, his Honor Judge SETTLE presiding.

The action is for maliciously and without any reasonable or probable cause arresting the plaintiff and holding him to bail on a warrant issued by a justice of the peace. Plea, not guilty. On the trial the case appeared to be this. The defendant sued out a warrant against the plaintiff for a debt of $10 30, and required him to be held to bail thereon. On the 30th March 1846, the constable arrested the plaintiff and returned the warrant. The trial was postponed by the Justice to the next day, and the constable then demanded bail from Howell, and, as he was about giving bail, Edwards told the constable he need not require a bond, and therefore the latter discharged the plaintiff from custody. On the next day the case was tried and the Justice gave judgment for Howell, and Edwards appealed to the County Court. Shortly afterwards the plaintiff brought this suit, and subsequently Edwards directed the magistrate not to return the appeal; and he accordingly withheld it. Upon the evidence, the counsel for the defendant, among several objections, insisted, that the action would not lie, because it was commenced before the original suit was determined; and he prayed the Court so to instruct the jury. But the Court refused the instruction, and informed the jury that the plaintiff might maintain his action, notwithstanding that objection. Verdict and judgment for the plaintiff, and an appeal by the defendant.

Edney and *Francis*, for the plaintiff.
J. W. Woodfin and *N. W. Woodfin*, for the defendant.

RUFFIN, C. J. In actions of this kind the declaration must show a legal determination of the original action; and here the plaintiff relies on a determination by a discontinuance and want of prosecution. But the evidence did not support the declaration in that point. For, admitting that the original action could be discontinued by the order not to return the appeal and was thereby ended, yet that order was not given until after the present action, was brought, and there is nothing to give it a relation so as to make it operate legally as a discontinuance from any prior time. This suit was therefore commenced prematurely; and the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and *venire de novo*.

BROWN AND MAXWELL vs. SAMUEL WALK.

In order to entitle a plaintiff to a writ of *capias ad satisfaciendum*, under our Act of 1844, it is sufficient for him to make affidavit "that the defendant had fraudulently concealed his money, property or effects to defeat his debt," without further setting forth that the defendant had no property, which could be reached by a *fieri facias*.

Appeal from the Superior Court of Law of Rowan County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

The defendant Walk was arrested under a *capias ad satisfaciendum*, at the instance of the plaintiff, and gave bond for his appearance at May Term of Rowan Court of Pleas and Quarter Sessions, where, upon the motion of his counsel, the execution was set aside, on the ground that it did not appear from the affidavit, that the defendant had no property which could be reached by a *fieri facias*. The plaintiff appealed to the Superior Court and the presiding Judge was of opinion, that the affidavit did not comply with the requisitions of the act of '44. The affidavit stated that the defendant Walk had fraudulently concealed his money, property or effects to "defeat the plaintiffs debt," and it did not further appear on the face of the affidavit, that the defendant had no property which could be reached by a *fieri facias*. He dismissed the proceedings, and the plaintiff appealed.

Avery, for the plaintiff.

Clarke, for the defendant.

NASH, J. The question in this case arises under the act of "44 ch. 31, which is as follows." Hereafter no *capias ad satisfaciendum* shall issue, unless the plaintiff his agent or attorney shall make affidavit in writing, be- the Clerk of the Court in which the judgment may be, or the justice of the peace to whom application is made for such process, that he believes the defendant has not property to satisfy such judgment, which can be reached by a *fieri facias*, and has property, money and effects which cannot be reached by a *fieri facias*, or has frauduently concealed his property, money, or effetcts, or is about to move from the State.

In the case before us, the plaintiff swore or made affidavit "that the defendant had fraudulently concealed his money, property and effects, to defeat the plaintiff's debt." The presiding Judge decided that the affidavit was in sufficient as it did not set forth *further*, that the defendant had no property which could be reached by a *fieri facias*, He seems to think that no affidavit under that act will.

authorize a *ca. sa.*, which does not on its face show, that the defendant has no property, which can be reached by a *fi. fa.* We do not concur in this opinion; to us it appears that there are, in the act, three distinct grounds, upon which a *ca. sa.* is authorized. The first is, when the affidavit of the plaintiff states that the defendant has no property to satisfy his judgment, which can be reached by a *fieri facias* and that he believes he has property, money or effects, which cannot be reached by a *fieri facias;* secondly, when he swears that the defendant has fraudulently concealed his effects, and thirdly, when he swears he is about to leave the State. The two first clauses in the act are coupled by the conjunction " and"—and therefore go together and with much propriety. If the first clause stood by itself, constituting a substantial ground, on which the *ca. sa.* should issue, the object of the act might in many cases be evaded. If a man has no property upon which a *fi. fa.* can be levied, he may be entirely insolvent, and honestly so. But it was the honestly insolvent debtor, the law intended to protect, in the first instance It is not therefore sufficient for the affidavit to contain simply the first clause; it must go further and set forth that he has property, money, and effects, which cannot be reached by a *fieri facias* and thereby show that he is not that honest debtor, for if he has the ability to pay, and will not, he cannot claim to be an honest man. But on the second ground of issuing the *ca. sa.*, the legislature authorizes it upon the fact, that the defendant has fraudulently concealed his property. It does not require that the plaintiff should swear that he so conceals it that a *fi. fa.* cannot be levied on it, because property so concealed is by law liable to be sold under a *fi. fa.* and also for another, and perhaps a little better reason, that the man, who does fraudulently conceal his property, is not discerning of protection against imprisonment; he is not the object intended to be favoured. The third clause provides

against those debters who are endeavouring to evade the payment of their debts by leaving the State. No honest man would so do. And if with a judgment obtained against him he endeavors to leave the State, and leave the judgment unsatisfied, it must be evident his object is a fraudulent one, and in such case, it cannot be necessary to set out in the affidavit the first ground. The Legislature intended, that that plan or purpose on the part of the debtor, should, of itself, authorize the *ca. sa.* In all the provisions of the act the object of the Legislature is, while it protects from imprisonment the debtor, who honestly surrenders up to his creditors his property of every description, not to shelter the knave or to assist him in carrying out his purposes or prevent the creditor from the use of all lawful means to procure satisfaction of his debt.

Judgment reversed. The opinion will be certified to the Court Superior that that Court may issue a *procedendo* to the County Court to proceed in the case.

PER CURIAM. Ordered accordingly.

WALTON vs. MOSES SMITH.

It is the rule of this Court, as in every other Court of errors, that he, who alleges error, must show it. The judgment appealed from must stand as correct, unless it is shown to be incorrect.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This is action on a guarantee, alleged to be contained in a letter, addressed by the defendant to the plaintiff. The case is as follows. The defendant lives in the County of Henderson, in this State, and, in January 1839, wrote to the plaintiff, who lives in the City of Charleston, a letter of credit, in favor of the two men, Posey and Lane. This letter was duly delivered to the plaintiff by Posey, and the plaintiff agreed to furnish him goods, which he did to the amount of $186, for which Posey gave him a note in the name of himself and Lane and payable six months thereafter. After this note came to maturity, the plaintiff sued Posey and Lane upon it, obtained judgment but failed to collect all that was due, in consequence of their inability to pay. This action was then commenced and the plaintiff obtained a judgment for the balance, due on the note, from which the defendant appealed to this Court.

N. W. Woodfin, for the plaintiff.
Baxter, for the defendant.

NASH, J. Many objections were made by the defendant, to the recovery of the plaintiff, none of which is it necessary for us to examine, as an obstacle has arisen here growing out of the case as stated, which is decisive of the cause. The defendant sets forth in his bill of exceptions that the plaintiff read in evidence, a letter of the defendant, dated January 1839, a copy of which marked A is sent as a part of the case, No such letter or copy of a letter is among the papers in the cause. At the last Term of the Court, when we were called on to look into the case, its absence was detected and supposing it might by mistake have been retained by the Clerk of Rutherford Superior Court, where the cause was tried, upon the suggestion of a diminution of the record, a *certiorari* was issued. A certified copy of the record, as it remains in his office, has been transmitted to us without containing

the required paper. It is evident, without it or an agreement between the parties as to its contents, the Court cannot determine the questions raised by the defendant. It is the foundation of the plaintiff's claim, that was before his Honor who tried the cause, and the whole of the charge addressed to the jury was made in reference to it. It is the rule in this Court, as in every other Court of errors, that he, who alleges error, must shew it. The judgment appealed from must stand as correct, until it is shown to be incorect. The defendant has made that letter a part of his case; it is not here to be seen and considered by the Court; it is admitted to have been lost, and the parties cannot agree as to its contents. We are compelled therefore to say we see no error in the judgment below.

PER CURIAM. Judgment affirmed.

HORACE L. ROBARDS vs. JOEL McLEAN.

To entitle a party to give evidence of the contents of a paper, which, it is alleged, has been lost, it is sufficient to shew, that there is no reasonable probability that any thing has been suppressed.

Thus, where a negro slave was taken into the defendant's stage, on his way from Granville to McDowell County and afterwards absconded, it was competent for the defendant to show, by parol testimony, that the slave had a written permission to travel from Granville to McDowell, alone, he being on the ordinary road between Granville and McDowell, when he was received into the defendant's stage.

Appeal from the Superior Court of Law of McDowell County, at the Spring Term, 1848, his Honor Judge BATTLE presiding.

The case is as follows. At the time the transaction took place, of which the plaintiff complains, he resided in the county of McDowell, and having gone into Granville County, took with him a negro slave, his property, by the name of Reuben. When about to return home, Reuben complained of being unwell, and was left in the care of Dr. Robards until sufficiently recovered to travel. An agent was afterwards sent by the plaintiff for Reuben, who, finding him in the town of Oxford, directed him to get ready to return home the next day. That night Reuben left Oxford, without any permit in writing or otherwise as alleged, and went to Hillsboro', near which place, he was permitted by the defendant's agent, to take a seat in the stage, belonging to the defendant and in which he was conveyed to Greensborough, whence he made his escape and never after returned to the plaintiff's service. The action is brought to recover damages for the loss of Reuben. One ground of defence was, that the plaintiff had given his slave Reuben a written permit to return home alone, and, to prove it, the defendant introduced one Mr. Gibbony, who testified, that he resided about four miles from the town of Greensborough, on the stage road leading to Salisbury, and on the direct rout, which Reuben would have to pass, on his return home from Granville, that Reuben came to his house and presented him a paper, which, after reading, he returned to Reuben, the contents of which the defendant's counsel offered to prove, after shewing that notice had been served on the plaintiff to produce it. This evidence was objected to by the plaintiff's counsel; on the ground, that it was not shown, that the paper was in the possession or under the control of the plaintiff. The Court admitted the evidence, because the paper was in the possession of the plaintiff's own slave, and also because it sufficiently appeared, that it was lost by having been carried off by the slave. The witness then stated, that the paper writing was directed to him, in the form of a note or order,

requesting him, if Reuben's mule should give out, he would furnish him with a horse, and let him have ten dollars, which John J. Shaver would return, as soon as the boy should reach Salisbury, and also to give him any other assistance he might require, for which he should be compensated. A verdict was rendered for the defendant, a rule for a new trial discharged, and appeal was taken to the Supreme Court.

Avery and *Guion*, for the plaintiff.

N. W. Woodfin and *Gaither*, for the defendant.

NASH, J. The whole case turns upon the admissibility of the parol evidence to prove the contents of the pass or permit. We see no ground to complain of the judgment. Before us it has been urged, that the notice to the plaintiff could not authorise the parol evidence of the contents of the alleged pass, because the case showed it was not in his possession. This may be true, but it was not upon the ground, that the paper was then in his possession, that the notice was given, but because the case showed, it was last seen in the possession of his slave, and therefore under his control, and to this he answers, that it is not in his possession nor under his control, because the boy, Reuben, had never returned to his possession; in other words that he had runaway and was lost to him. So that the plaintiff, himself, proves that the pass is lost. It is upon this ground, we think his Honor's opinion was right. It has been further argued by the plaintiff's counsel, that the pass, according to the testimony was as much under the control of the defendant as of the plaintiff, and it is insinuated, rather than asserted, that before he could resort to the secondary evidence, he ought to show that he had sent to Ohio, where, it is understood, Reuben is, and procured from him the pass, and the case of *Deaver and Rice*, 2 Ire. 280, has been cited as an authority. That case decides, that when an execution was shewn to have

been in the hands of a constable, it is not sufficient, to let in the secondary evidence of its contents, to show, that the constable had removed to another State, and had left his papers generally with an agent, who testified that the execution would not be found among the papers so left. This decision was unquestionably made upon correct grounds. The party, offering the secondary evidence, had not shown that the execution was lost; it might still be in the possession of the constable, and it was in the power of the plaintiff to procure his deposition. Here the negro Reuben had runaway from his master. The case does not show where he is, and there is no presumption, if he was, as was alleged, in the State of Ohio, that he still had in his possession the permit or pass, nor was there any mode known to the law, whereby the defendant could, if it was still in his possession, have obtained it or proved by Reuben its loss. To admit this secondary evidence, it is sufficient to show, that there is no reasonable probability, that any thing has been suppressed. *McGahey and Alston*, 2 M. & T. 206, 2 St. N. P. 152. This case differs from that of *Harvin & wife against Hunter & Springs*, at this term, in this, that, in the latter case, it does not appear sufficiently to the Court, that the originals were lost; here that fact does affirmatively appear.

We have examined the cases to which our attention has been called by the plaintiff's counsel, and while we admit their correctness do not think them applicable to the case before us.

PER CURIAM. Judgment affirmed.

CULPEPPER LEE *vs.* WILLIAM RUSSELL.

Where an action is brought for a breach of contract in not conveying land according to the contract, it is not necessary for the plaintiff to bring into Court the price agreed to be given for the land, if he shews he complied with his part of the contract by tendering what he was bound to pay.

Appeal from the Superior Court of Law of Lincoln County, at the Fall Term, 1847, his Honor Judge PEARSON, presiding.

The action is debt on a bond with condition, which, after reciting that the plaintiff had that day sold and conveyed to the defendant a tract of land, therein described, for the price of $448, 59 proceeds thus, "now, if the said Lee shall within two years from this date pay to the said Russell, the said sum of $448 59, and the said Russell, shall then convey the foregoing land to the said Lee, or if the said Lee shall not comply with the foregoing conditions within the said term of two years, then this obligation to be void, but otherwise to remain in full force."

The breach assigned is, that, on a certain day, within the two years, the plaintiff tendered the sum of $448 59, to the defendant and requested him to convey the land, and that the defendant refused. Pleas, conditions performed and conditions not broken. On the trial the plaintiff gave evidence, that he tendered the money and demanded the deed, as alleged in the declaration; and that the defendant refused to receive the money and execute a deed, saying, that he was entitled also to interest on the money. The plaintiff gave further evidence, that the land was worth $450, and that the defendant had received rents for the land, during the two years, exceeding the interest.

The counsel for the defendant thereon insisted, that, besides the averment of the tender of the price, the declaration ought to have averred that the plaintiff had been always ready and was still willing and ready to pay the money, and that it should have been brought into Court. A verdict was taken for the plaintiff's damages, one dollar, subject to the opinion of the Court upon the point made; and, afterwards the Court set aside the verdict and ordered a nonsuit, and the plaintiff appealed,

Coleman and *Thompson*, for the plaintiff.
Barringer, *Osborne*, and *H. C. Jones*, for the defendant.

RUFFIN, C. J. There would be more in the objections, if the plaintiff was to recover in this action the land or a conveyance of it, as justice would require, that he should, in that case, pay the price, as when in equity there is a decree for specific performance. But that is not the nature of the action, which is for damages for the non-performance of the agreement on the part of the defendant, namely, by his not receiving the price and conveying the land. It is not in affirmance of the contract, but for a breach of it, and it supposes the plaintiff to keep his money and the defendant to keep the land, and the plaintiff seeks his redress in damages for the loss sustained by him from that state of things, arising from the fault of the defendant in not performing his engagement, after the plaintiff had complied with the prior condition on his part. The measure of those damages is, obviously, the difference between the sum the plaintiff was to have given for the land, which in the event, however, he did not give, and the value of the land he would have got, if the defendant had conveyed. It would therefore be to no use to bring the money into Court. For, if that were required, then the plaintiff ought to recover the whole value of the land, and be allowed to take back his money in part thereof: which is precisely the same thing as not bring-

ing it in at all, and having his damages assessed for the difference between it and the value of the land. It is apparent then, that the nature of the action was misconceived; for, certainly, it would comport neither with justice nor law, that the purchaser should bring in the whole price for the vendor, and then get damages of one dollar, as here. As the plaintiff does not get the land nor its value, he is not bound to pay for it, nor, consequently, to keep the money ready for that purpose.

The judgment must therefore be reversed, and judgment entered for the plaintiff according to the verdict.

Per Curiam. Judgment reversed.

THOMAS MURRAY vs. ELISHA KING & AL.

In an action of assumpsit to recover back money paid as usurious interest, the verdict was as follows "who find all payments within three years, either on notes given before or otherwise with interest thereon in favor of the plaintiff, to wit, $558 and $100 with interest on the same." The judgment on that verdict was "for the sum of $935, of which $658 bears interest from the 10th day of October 1847 till paid." *Held*, that the judgment did not appear to correspond with the verdict, and, even if it did, the verdict is, in itself, insufficient and insensible.

Appeal from the Superior Court of Law of Buncombe County, at the Fall Term 1847, his Honor Judge Settle presiding.

The action was assumpsit for money had and received, in which the plaintiff sought to recover the excess above the principal and lawful interest, paid by him upon a